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No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
GENERAL MOTORS ACCEPTANCE CORPORATION, and
GMAC LEASING CORPORATION,

Petitioners,

v.

DEPARTMENT OF REVENUE,
STATE OF ALABAMA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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April 10, 1990

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QUESTIONS PRESENTED

The State of Alabama imposes a franchise tax on foreign corporations for the privilege of carrying on business within its borders. The tax is imposed on an apportioned base that consists of the amount of the foreign corporation's capital stock, surplus (including retained earnings), long-term debt and certain other items of "capital" that are "employed" in Alabama. The tax rate is $3 per $1,000 of taxable base.

A franchise tax is also imposed on domestic corporations, but their tax base consists only of "capital stock," i.e., the par value of each domestic corporation's outstanding stock (or stated value in the case of no-par stock). In 1982 and 1983, the tax rate was $3 per $1,000 of taxable base; in 1984, the rate was increased to $10 per $1,000.

As a result of the significant difference in the tax base utilized by foreign and domestic corporations, Alabama collects a grossly disproportionate amount of franchise taxes from foreign corporations. In the years 1982 and 1983, when there were three times as many domestic corporations as foreign corporations doing business in Alabama but both groups of corporations in the aggregate actually employed close to the same amount of total capital in the State, the aggregate tax burden imposed on foreign corporations was over 900 percent of the burden imposed on domestic corporations. Since 1984, when the tax rate on domestic corporations was increased from $3 to $10 per $1,000 of taxable base, the tax differential has exceeded well over 300 percent.

The questions presented are:

1. Whether the discriminatory tax burden imposed on foreign corporations relative to domestic corporations under the Alabama franchise tax scheme violates the Commerce Clause of the United States Constitution, art. I, sec. 8, cl. 3.

2. Whether the discriminatory franchise tax classification adopted by Alabama violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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LIST OF PARTIES AND RULE 29.1 STATEMENT

In addition to Petitioners, the only parties to the proceedings below other than Respondent were Reynolds Metals Company and James C. White, Sr., then Commissioner of Revenue, State of Alabama.

Petitioner General Motors Corporation is the parent corporation of petitioner General Motors Acceptance Corporation, which in turn is the parent corporation of petitioner GMAC Leasing Corporation. Direct and indirect affiliates of General Motors Corporation, other than wholly owned subsidiaries, are listed in the Appendix hereto, pp. 71a-76a.

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama in the consolidated cases has not yet been reported. The court's opinion is reproduced in the Appendix at pages 1a-38a. The order of the Supreme Court of Alabama denying rehearing is reproduced in the Appendix at pages 69a-70a. The opinion of the Alabama Court of Civil Appeals has not been reported. The court's opinion is reproduced in the Appendix at pages 39a-49a. The order of the Circuit Court of Montgomery County has not been reported. The court's opinion is repro-

duced in the Appendix at pages 50a-54a. The partial judgment and final judgment of the Circuit Court of Montgomery County have not been reported. The court's judgments are reproduced in the Appendix at pages 55a-56a and 57a-68a, respectively.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on December 21, 1989. Petitioners' timely petition for rehearing was denied on January 12, 1990. (App. 69a-70a.) The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution, art. I, sec. 8, cl. 3 provides: The Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Equal Protection Clause of the United States Constitution, amend. XIV, provides that: "[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Relevant portions of the Alabama Constitution and the Alabama tax statutes are set forth in the Appendix at pages 77a-78a and 79a-81a, respectively.

STATEMENT

A. Alabama Taxing Scheme

The State of Alabama imposes a franchise tax on foreign corporations doing business in Alabama at the

rate of $3 per $1,000 of "the actual amount of . . . capital employed in this state." Ala. Code sec. 40-14-41(a) (1975). The term "capital" for this purpose includes a number of components, such as (a) the par value (or stated value) of the foreign corporation's outstanding capital stock, (b) surplus (including paid-in surplus, capital surplus and retained earnings), (c) long-term debt, (d) certain other debt owed to related parties, and (e) accelerated depreciation. Ala. Code sec. 40-14-41(b) (1975).

Domestic corporations are not subject to the same tax. Instead, they are subject to a franchise tax "based on its capital stock." Ala. Code sec. 40-14-40 (1975). For this purpose, the term "capital stock," the sole element in the domestic corporation's tax base, is limited to the par value (or stated value) of its outstanding stock (App. 10a-11a), which is only one of the elements in the foreign corporation's tax base. The term "capital stock" does not include paid-in surplus or capital surplus, retained earnings, long-term debt, or any of the other components in the foreign corporation tax base. Through 1983, the rate of tax on domestic corporations was $3 per $1,000 of "capital stock"; beginning in 1984, the rate was increased to $10 per $1,000.

B. Effect on Foreign Corporations

The dramatic difference in the tax base for the two types of corporations (apportioned "capital" for foreign corporations, unapportioned "capital stock" for domestic corporations) results in an egregiously discriminatory franchise tax being imposed on foreign corporations doing business in Alabama. Two corporations, identically situated in terms of size, capitalization, and the extent of their business activity within

and without Alabama, will incur totally different tax liabilities if one is foreign and the other domestic. The reason for this is that while the amount of business activity conducted and total capital employed in Alabama means *everything* in determining the foreign corporation's tax liability, business activity conducted and total capital employed mean *nothing* in determining the domestic corporation's liability. Only the par value of stock is taken into account in taxing domestic corporations.

The record in the instant case unmistakably establishes the gross discrimination involved. For example, petitioner GMAC Leasing Corporation was assessed an amount of franchise taxes for the years 1983 through 1986 that was 11,000 percent more than it would have paid had it been a domestic corporation conducting the same business in Alabama. (See App. p. 82a; R. 56, 59, 62, 65.)

In addition, the record shows that foreign corporations as a group, whose capital employed in Alabama in 1983 equalled 122 percent of the capital employed by domestic corporations (55 percent v. 45 percent, R. 608), paid over 900 percent of the franchise taxes paid by their domestic counterparts in 1982 and 1983, and over 300 percent of such tax in subsequent years. (R. 364.) The record also shows that had domestic corporations been taxed on the same basis as foreign corporations, they would have paid significantly more tax. For example, in 1983, domestic corporations would have paid approximately $38 million in franchise taxes, rather than the $5 million they actually paid, had they been taxed on the same basis as foreign corporations. (R. 327, 370.)

C. Historical Origins of Alabama Franchise Tax

The Alabama taxing scheme is the outgrowth of a previous challenge to the discriminatory burden imposed by that State on foreign corporations at the beginning of this century. In 1910, this Court struck down the Alabama franchise tax as then imposed on foreign corporations. *Southern R. Co.* v. *Greene*, 216 U.S. 400 (1910). No franchise tax had yet been enacted for domestic corporations, which were then subject only to a nominal license tax. This Court held that the Alabama franchise tax imposed on foreign corporations violated the Equal Protection Clause.

> We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws . . . .

Id. at 418.

Following the decision in *Southern Railway*, Alabama enacted the predecessor of the current version of the State franchise tax. Domestic corporations became subject to the franchise tax for the first time. This Court then upheld the new scheme in response to a challenge by a domestic corporation. *Kansas City, M. & B. R. Co.* v. *Stiles*, 242 U.S. 112 (1916). Two years later, a foreign corporation unsuccessfully challenged the new Alabama taxing scheme as being discriminatory as to it. *Louisville & Nashville R. Co.* v. *State*, 201 Ala. 317, 78 So. 93 (1918), *error dismissed*, 248 U.S. 533 (1918). The Alabama Supreme Court upheld the statute, finding that the purpose and in-

tent of the new law was to *avoid* discrimination between the two classes of corporations. *Id.*, at 318, 78 So. at 94. The court noted, however, that a different result might be indicated if the tax were to be assessed in a manner that resulted in arbitrary discrimination against foreign corporations. *Id.*

D. Reasons for Discrimination

While the forerunner of the current Alabama taxing scheme received early judicial approval, it is undeniably clear that over the years the State franchise tax has become grossly discriminatory against foreign corporations. There are two principal reasons for this development.

First, the concept of par value as an appropriate measure of "capital stock" has changed significantly since the franchise tax was originally enacted. Under modern corporation law in Alabama (Ala. Bus. Corp. Act, sec. 10-2A-35), as elsewhere, a corporation is free to issue its stock with a designated par value of virtually any amount up to the total amount of capital paid in. In other words, par value can be an artificially selected amount that is *less* than, and bears no relation to, the actual capital paid in. If it is less, the excess is designated "paid-in surplus" or "capital surplus," amounts that are included in the foreign corporation's tax base but not in the domestic corporation's tax base.

Second, in the years since *Southern Railway*, *supra*, the Alabama legislature has expanded the tax base for foreign corporations by adding additional items (*e.g.*, long-term debt and accelerated depreciation) to be treated as "capital" employed in Alabama (Ala. Acts 1961, No. 912), while at the same time leaving

"capital stock" as the sole component of the domestic corporation tax base.

Domestic corporations are thus in a position to manipulate their franchise tax base simply by reducing the par value of their stock. The State admits this point. (R. 96, 85.) By contrast, foreign corporations, with a much broader tax base (i.e., total capital paid in, retained earnings, long-term debt, etc.), do not have the same opportunity. The State admits this point as well. (R. 96, 86.)

E. Proceedings Below

Petitioners General Motors Corporation and GMAC Leasing Corporation (GMAC Leasing) are Delaware corporations carrying on business in Alabama. Petitioner General Motors Acceptance Corporation (GMAC) is a New York corporation carrying on business in Alabama. For various of the years 1983 through 1988, petitioners brought the action below to recover refunds of franchise tax paid in the aggregate amount of $6.3 million, on the ground that such tax was unconstitutionally discriminatory as to them.

Both the trial court and the Court of Civil Appeals below agreed with petitioners that the Alabama franchise tax discriminated unconstitutionally against foreign corporations. Both courts based their decision on Equal Protection grounds, thereby finding it unnecessary to consider the companion Commerce Clause challenge raised by petitioners. However, neither court allowed petitioners a recovery of the refunds they sought. (*Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).)

The Alabama Supreme Court, acting in conjunction with a request from the Governor for an advisory

opinion on the constitutionality of a proposed new taxing scheme, issued a writ of certiorari to the Court of Civil Appeals, *sua sponte*, seven days after the appellate decision was handed down. Following the receipt of briefs and oral argument, it reversed the Appeals Court two weeks later. The Alabama Supreme Court held that while the tax was "somewhat more discriminatory" against foreign corporations, such discrimination did not rise to the level of "constitutional significance" under the Commerce Clause or the Equal Protection Clause.

REASONS FOR GRANTING THE WRIT

This Court has consistently held that a state tax places an undue burden on interstate commerce in violation of the Commerce Clause if it discriminates in favor of local enterprises by imposing a higher tax burden on foreign corporations carrying on business in the state than on domestic corporations engaged in comparable activity. *Best & Co.* v. *Maxwell*, 311 U.S. 454, 456-457 (1940); *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 72-74 (1963).[1] This Court has also declared that any statute designed to benefit in-state economic interests by burdening out-of-state competitors will be routinely struck down under the Commerce Clause, unless the discrimination is "demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 274 (1988).

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[1] *See also Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1976); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 (1984); *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 403 (1984).

The decision of the Alabama Supreme Court completely disregards these well-established principles. It upholds a facially discriminatory taxing statute that has no purpose other than to foster economic protectionism. The decision below is thus completely contrary to the clear Commerce Clause teachings of this Court, and cannot be allowed to stand.

In addition, since there was no legislative intent to produce discrimination at the time the Alabama taxing scheme was originally enacted (its very purpose was to *avoid* discrimination against foreign corporations), and since no legitimate legislative purpose for its discriminatory application exists today, the tax as applied to foreign corporations also violates the Equal Protection Clause. *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1984); *Williams* v. *Vermont*, 472 U.S. 14 (1984); *WHYY, Inc.* v. *Glassboro*, 393 U.S. 117 (1968); *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949).[2]

Indeed, if the decision below is not reversed, it will stand as a reaffirmation of the now fully discredited position that under the guise of a "privilege" tax, states are free to impose any burdens they choose on foreign corporations seeking to do business there. (*See Lincoln National Life Ins. Co.* v. *Read*, 325 U.S. 673, 676-677 (1945).) That notion was finally laid to rest in *Western & Southern Life Ins. Co.*, *supra*, n.2, at 667, and should not be resurrected now.

Because the decision below is so fundamentally at odds with this Court's pronouncements under both the

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[2] *See also Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981); *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, ___ U.S. ___, 109 S.Ct. 633 (1989)

Commerce Clause and the Equal Protection Clause, and because the outcome of this case will affect other taxpayers with a total of more than $200,000,000 at stake (R. 683), this Court should grant the writ.

I. THE ALABAMA FRANCHISE TAX PLACES AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

A. The Alabama Franchise Tax is Facially Discriminatory.

There can be no dispute that sec. 40-14-41 of the Alabama Code, which imposes only on foreign corporations a franchise tax based on an apportioned amount of their capital stock, surplus (including retained earnings), long-term debt, and certain other items, is facially discriminatory. The trial court below so held, and the appellate court affirmed that holding. The reversal of those decisions by the Alabama Supreme Court is directly contrary to the principles enunciated by this Court in *Halliburton Oil Well Cementing Co.* v. *Reily, supra.* In that case, the Louisiana use tax on out-of-state purchases utilized a broader base than the sales tax on in-state purchases. This Court declared the use tax to be unconstitutional because of the resulting discrimination in favor of in-state purchases.

The situation here is also closely analogous to that involved in *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984). There, the West Virginia gross receipts tax imposed on sales at wholesale made only by out-of-state manufacturers was held to be facially discriminatory, notwithstanding the fact that in-state manufacturers were subject to a tax at a higher rate on their gross receipts from manufacturing.

As was true with respect to the manufacturing tax in *Armco*, the franchise tax that Alabama imposes on

domestic corporations under sec. 40-14-40 cannot be used to neutralize the facially discriminatory tax imposed on foreign corporations under sec 40-14-41. Because the two taxes are, in effect, imposed on totally different aspects of corporate presence in Alabama—the par value of shares outstanding in the case of domestic corporations, and the actual carrying on of business in the case of foreign corporations—they do not tax "substantially equivalent events." *Armco*, *supra* at 643. Thus, even with its currently higher rate, the domestic corporation franchise tax does not eliminate the constitutional infirmity in the Alabama scheme.[3]

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[3] The Alabama Supreme Court's conclusion that there was "no discrimination of constitutional significance" present in the instant case also resulted in part from its erroneous treatment of the Alabama "domestic shares tax" as a "complementary tax" that, in its view, further reduced the discrimination between foreign and domestic corporations. The "shares tax" is an *ad valorem* tax measured by the domestic corporation's intangible asset value. It is imposed on the domestic corporation's *shareholders*. Ala. Code sec. 40-14-70. While domestic corporations are permitted to, and generally do, pay the shares tax on behalf of their shareholders, if they fail to do so the State has the right to assess the tax against the shareholders. *Smith* v. *Burton*, 283 Ala. 391, 217 So. 2d 540 (1969).

Not only is the shares tax imposed on a different class of taxpayers, but it also is imposed on an "event" (share ownership) that is not "substantially equivalent" to the "event" (business activity in Alabama) on which the foreign corporation franchise tax is imposed. (*Armco*, *supra* at 643.) In no way can the domestic shares tax properly be considered a complementary tax for purposes of testing the validity of the foreign corporation franchise tax. *Maryland* v. *Louisiana*, 451 U.S. 725, 759 (1987). Moreover, even if the domestic shares tax is taken into account together with the domestic franchise tax, the combined burden

B. The Alabama Supreme Court Completely Ignored Basic Commerce Clause Principles.

In its decision below, the Alabama Supreme Court framed the issue as follows: "The question, as we see it, is whether the franchise tax on foreign corporations *invidiously* discriminates against them by imposing a grossly disproportionate tax on them for no other reason than to provide competitive advantage to domestic corporations." (Emphasis in original.) (App. 21a.)

In the court's view, the franchise tax had become "somewhat more discriminatory" over the years, but was not sufficiently discriminatory to be struck down. In so concluding, the court completely disregarded numerous decisions of this Court holding that there is no quantitative hurdle to be cleared in order to establish unconstitutional discrimination under the Commerce Clause. *E.g., Maryland* v. *Louisiana, supra*, n.3, at 760; *Bacchus Imports, Ltd.* v. *Dias, supra*, at 269; *Halliburton Oil Well Cementing Co.* v. *Reily, supra*, at 73.

According to the court below, a taxing scheme such as Alabama's can constitutionally be used as an "incentive" to influence the decision where to incorporate a particular business. Yet, if every state adopted a franchise tax scheme identical to Alabama's, a corporation with multi-state activities would be forced to form numerous local subsidiaries in order to compete on equal terms with its domestic counterparts, or else allow itself to be subjected to a grossly discriminatory tax burden relative to its competitors. Under such

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does not fully eliminate the unconstitutional discrimination against foreign corporations.

circumstances, the decisions whether to operate in subsidiary form and where to incorporate a subsidiary would no longer be "tax-neutral" decisions. *Boston Stock Exchange* v. *State Tax Comm'n, supra,* at 331; *see also Westinghouse Electric Corp.* v. *Tully, supra,* at 406.

A tax scheme that encourages the "fractionalization" of business by providing an incentive to incorporate (or reincorporate) domestically solely to be able to compete on "tax-neutral" terms with local entities is precisely the type of parochial legislation prohibited by the Commerce Clause. Stated differently, any taxing scheme that favors local incorporation over foreign incorporation with respect to business conducted locally is constitutionally infirm under the Commerce Clause. *Halliburton Oil Well Cementing Co.* v. *Reily, supra,* at 72. The free trade zone contemplated by the Commerce Clause cannot tolerate such discrimination.

The Alabama Supreme Court's additional conclusion that the tax should not be held invalid because some foreign corporations would actually incur a higher tax liability if they became domestic corporations overlooks three critical points.

First, the court conveniently ignored the fact that petitioner GMAC Leasing Corporation was assessed 11,000 percent more in franchise taxes as a foreign corporation than it would have paid as a fully domestic corporation for the years 1983-1986, given the $5,000 total par value of its stock. (App. 82a; R. 56, 59, 62, 65.) In 1984 alone, petitioner GMAC Leasing was assessed 26,000 percent more in franchise taxes than it would have paid as a fully domestic corporation. (App. 82a.) Even under the Alabama view of

what is required for a Commerce Clause violation, such discrimination surely must rise to the level of "constitutional significance."

Second, the Alabama Supreme Court mistakenly took comfort from its observation that if petitioner GMAC had chosen to reincorporate its entire business in Alabama, it would have paid $21,650,000 in franchise tax rather than the $1,370,427 it actually paid in 1986. Here, the court completely ignored what it was forced to acknowledge elsewhere in its own opinion, namely, that GMAC would be free to establish a domestic subsidiary to house its Alabama operation without having to reincorporate its entire business in Alabama. (App. 37a.) That subsidiary could easily issue low par value stock that would attract only the bare minimum domestic franchise tax. Thus, the discrimination against GMAC, as well as petitioner General Motors Corporation, resulting from the excessive franchise tax burden imposed on them is real, not fanciful.

Finally, this Court has squarely rejected the suggestion that *all* foreign corporations must be discriminated against by the tax in question in order to sustain a Commerce Clause challenge. *American Trucking Assns., Inc.* v. *Scheiner*, 483 U.S. 266, 286 (1987) (rejecting State's claim that flat tax was valid because there was no discrimination against heavy users of Pennsylvania roadways).[4]

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[4] In its effort to show that no meaningful discrimination existed, the Alabama Supreme Court also accepted a number of calculations offered by the State to show that the "average" domestic corporation paid almost as much tax as the "average" foreign corporation once their size differentials were taken into

In sum, the nature of its tax base places the foreign corporation at a distinct competitive disadvantage relative to its domestic counterpart, and forces it to consider the domestication of its entire operation, or at least its Alabama activities, in order to be relieved of its unfair and discriminatory tax burden. Contrary to the view of the Alabama Supreme Court, putting the foreign corporation to such a choice as the price for carrying on business in Alabama places an unconstitutional burden on interstate commerce.

II. THE USE OF A DIFFERENT FRANCHISE TAX BASE FOR FOREIGN AND DOMESTIC CORPORATIONS DEPRIVES FOREIGN CORPORATIONS OF THE EQUAL PROTECTION OF THE LAWS.

This Court has not hesitated to invoke the Equal Protection Clause to reject attempts to tax nonresidents on a more onerous basis than that applied to similarly situated residents. *Southern R. Co.* v. *Greene*, *supra*, at 418; *Wheeling Steel Corp.* v. *Glander*, *supra* at 572 (inclusion of intangibles owned by foreign corporations, but not domestic corporations, in *ad valorem* tax base deprives foreign corporations, solely on the basis of their residence, of the equal treatment to which they are constitutionally entitled).[5]

As has been shown in Section I, above, and as the trial and appellate courts below held, the Alabama

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account. The calculations are misleading, if not fallacious, because they ignore the fact that the size of the domestic corporation has no bearing on its tax base, because of the domestic corporation's unique ability to manipulate its tax base merely by issuing stock with a low par value.

[5] *See also Metropolitan Life Ins. Co.* v. *Ward*, *supra*, at 878; *Williams* v. *Vermont*, *supra*, at 23; *WHYY, Inc.* v. *Glassboro*, 393 U.S. 117, 120 (1968).

franchise tax classification grossly discriminates against foreign corporations relative to their domestic counterparts. The issues thus remaining with respect to the Equal Protection Clause are (1) whether the challenged classification has a legitimate state purpose, and (2) whether it was reasonable for the State to believe that use of the challenged classification would promote that purpose. *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, *supra*, at 668. On these points, the decision below again reached fundamentally erroneous conclusions.

A. No Legitimate State Purpose is Served by the Classification Adopted by Alabama.

1. The Original Purpose of the Classification—to Prevent Discrimination Against Foreign Corporations—Cannot Serve as a Legitimate Purpose for the Current Discrimination.

More than seventy years ago, the Alabama Supreme Court stated unequivocally that the legislative classifications that formed the basis for the current franchise tax regime were designed "for the sole purpose of avoiding discrimination against foreign corporations." *Louisville & Nashville R.* v. *State*, *supra*, at 318, 78 So. at 94. What was originally a legitimate purpose for the classifications at issue, namely, to *avoid* discrimination, cannot possibly serve today as a legitimate purpose for such classifications, since they actually *promote* the very discrimination they were intended to prevent.

2. The Suggested "Ease of Regulation" of Domestic Corporations Relative to Their Foreign Counterparts Is Not a Legitimate State Purpose Here.

The trial court found that the State "failed to advance any legitimate state purpose" for the current

discrimination against foreign corporations. (App. 52a.) Before the Court of Civil Appeals, the State contended that the discrimination against foreign corporations "rationally relates to the purpose of offsetting possible *difficulties of enforcing* the franchise tax against foreign corporations." (Emphasis in original.) (App. 43a.) However, the appellate court found the alleged purpose to be unpersuasive in light of the testimony of the Chief of the Franchise Tax Division that foreign corporations were easier to regulate and the remedy against them easier and less costly to enforce. (R. 620, 625) (App. 43a.) It held that the franchise tax was "clearly a discriminatory tax with no legitimate state purpose." (App. 44a.)

Based on the record below, the suggested "ease of regulation" of domestic corporations cannot justify the challenged classification.

3. The Remaining Purposes Suggested By the Alabama Supreme Court Cannot Serve as A Valid Basis for the Classification.

As its final effort to support the tax, the Alabama Supreme Court declared that there were "a number of legitimate purposes of the present legislation that are apparent to this Court." (App. 35a.) They were said to include, in addition to ease of regulation, "differences in the utilization of state natural resources between foreign and domestic corporations, and differences in the employment of state residents and utilization of state services between foreign and domestic corporations." (App. 36a.)

Whatever the rule for finding a legitimate state purpose, surely it must come from the four corners of the record, and surely the State (or its highest court) must offer more than idle speculation. Not only

does the court below fail to explain the purported "differences," or whether they are greater or lesser with respect to foreign, as distinguished from domestic, corporations. It also fails to offer any indication of the magnitude of any such differences, or even how they can logically relate to the place of incorporation, so that the legitimacy of the suggested purpose can fairly be tested. No court should be allowed to rely on such pure speculation to fend off a challenge under the Equal Protection Clause.

B. In the Absence of a Legitimate State Purpose, the Discriminatory Tax is Invalid.

Since there is no legitimate state purpose for the classification currently utilized, the discriminatory tax in question cannot rationally serve to promote a legitimate purpose. Accordingly, the decision below must be reversed for that reason alone.

III. PETITIONERS' CLAIM FOR RETROACTIVE REFUNDS

In light of the Alabama Supreme Court's decision upholding the constitutionality of the franchise tax, the refundability of the tax paid by petitioners in the years 1982 through 1988 was not considered by that court. Petitioners recognize that this Court currently has under consideration issues relating to the extent to which decisions declaring state taxes unconstitutional will be given retroactive effect. *American Trucking Assns., Inc.* v. *Gray*, 746 S.W.2d 377 (Ark. 1988), *cert. granted*, 109 S.Ct. 389 (1988), *reargued*, 58 U.S.L.W. 3411 (U.S. Dec. 6, 1989); *Division of Alcoholic Beverages and Tobacco* v. *McKesson Corp.*, 524 So.2d 1000 (Fla. 1988), *cert. granted*, 109 S.Ct. 389 (1988), *reargued*, 58 U.S.L.W. 3411 (U.S. Dec. 6, 1989).

As noted, retroactive refunds remain an issue in the instant case.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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April 10, 1990

APPENDIX

APPENDIX A

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1989-90

89-386

In re: James C. White, Jr., etc., and
State Department of Revenue

v.

Reynolds Metals Company, et al.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(Montgomery Circuit Court, CV-86-1093, CV-87-1837, CV-88-411, CV-88-424, CV-88-425, and CV-88-426-G)

ALMON, JUSTICE.

This Court issued a writ of certiorari in this case to address the questions raised by an advisory opinion request from the Governor. See *Opinion of the Justices No. 330*, [Ms. Dec. 5, 1989] ___ So. 2d ___ (Ala. 1989). At issue is the constitutionality of Alabama's franchise tax on corporations that are incorporated under the laws of other states, Ala. Code 1975, § 40-14-41 (foreign corporations). The challenge to § 40-14-41 concerns the relation of the tax imposed by that section to the franchise tax on corporations that are incorporated under the laws of this state, Ala. Code 1975, § 40-14-40 (domestic corporations). The two taxes are mandated by Ala. Const. 1901, Art. XII, §§ 229 and 232. The trial court held that § 40-14-41 violates the Equal Protection Clause of the Fourteenth

Amendment to the United States Constitution, pretermitting discussion of the plaintiffs' challenge under the Commerce Clause, U. S. Const. Art. I, § 8, cl. 3. The Court of Civil Appeals affirmed, *White v. Reynolds Metals Co.*, [Ms. Civ. 7246-X, Nov. 28, 1989] ___ So. 2d ___ (Ala. Civ. App. 1989).

On July 28, 1986, Reynolds Metals Company filed a petition for a writ of mandamus ordering the Commissioner of Revenue to set aside assessments of franchise taxes paid by Reynolds in 1982 and 1983 and to refund the taxes paid. Similar petitions, or appeals from denials of refunds, were filed by General Motors Acceptance Corporation ("GMAC"), GMAC Leasing Corporation, and General Motors Corporation ("GM"). Because all of the proceedings challenged assessments made pursuant to § 40-14-41 as violating the Equal Protection Clause and the Commerce Clause, the cases were consolidated. Amended pleadings were filed regarding subsequent tax years. The trial court entered a summary judgment for the plaintiffs.

Section 229 of the Constitution, as amended by Amendment 27, reads, in pertinent part:

> "The legislature *shall*, by general laws, provide for the payment to the state of Alabama of a franchise tax by corporations organized under the laws of this state which shall be in proportion to the amount of capital stock."

(Emphasis added.)

Section 232 of the Constitution, as amended by Amendment 473,[1] reads, in pertinent part:

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[1] The pertinent language of §§ 229 and 232 was not changed by the amendments to those sections; the language quoted is the same as originally adopted in 1901, except that Amend. 473 dropped the word "any" as a modifier of "business" where that word first appears in § 232.

> "No foreign corporation shall do business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. . . . The legislature *shall*, by general law, provide for the payment to the state of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state."

(Emphasis added.)

Section 40-14-40 imposes on domestic corporations an annual franchise tax of $10 on each $1000 of capital stock, or a minimum of $50. Section 40-14-41(a) imposes on foreign corporations an annual franchise tax of $3 on each $1,000 of "the actual amount of its capital employed in this state," or a minimum of $25. Paragraph (b) of § 40-14-41 defines "capital," as we shall more fully discuss below; paragraph (c) provides that the actual amount of capital employed in this state "shall be determined in accordance with generally accepted accounting principles appropriate in the particular case"; and paragraph (d) sets forth exclusions and deductions.[2]

The circuit court and the Court of Civil Appeals viewed the Equal Protection Clause as requiring that the same franchise tax be imposed on both domestic and foreign corporations. However, § 40-14-40 imposes a tax that is "in proportion to the amount of capital stock" of a domestic corporation, that is, exactly as prescribed by § 229 of the Constitution; and, although § 40-14-41 provides in

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[2] Section 40-14-41.1 imposes on "every corporation required by section 40-14-40 and 40-14-41 to pay an annual franchise tax . . . an additional annual franchise tax of $.06 on each $1,000.00 of its capital stock *or* of the actual amount of its capital employed in this state." (Emphasis added.)

detail for the measurement of the "actual amount of capital employed" by a foreign corporation in this state, that section also sets forth a method of taxation that is designed to follow the mandate of the corresponding section of the constitution, § 232.

A franchise tax that apportioned a domestic corporation's capital stock according to how much of it was employed in this state, or that used a different measure than "capital stock," would presumably not be "in proportion to the amount of capital stock" and thus would violate § 229. A franchise tax on the full amount of a foreign corporation's capital stock would clearly violate § 232. Thus, it appears that a tax calculated in the same manner for both domestic and foreign corporations would violate either § 229 or § 232 and that the legislature would be justified in enacting franchise taxes tailored to the terms of those sections.

Therefore, a holding that the Equal Protection Clause or the Commerce Clause requires the same tax to be applied to both domestic and foreign corporations appears to require a holding that either § 229 or § 232 of our Constitution violates the United States Constitution. This we are loath to do. Although the Supremacy Clause, U.S. Const. Art. VI, cl. 2, binds "the judges in every state" to abide by the United States Constitution, "any thing in the Constitution or laws of any state to the contrary notwithstanding," we are also sworn to "support the Constitution of the United States, and the Constitution of the State of Alabama." Ala. Const. 1901, Art. XVI, § 279. It is therefore our duty to support both, if that be possible, before we conclude that the one violates the other.

History of the Franchise Taxes

To clarify the current relationship of the domestic and foreign corporation franchise taxes, we shall summarize their historical development.

After the adoption of the Constitution of 1901, the legislature adopted a franchise tax only on foreign corporations. Ala. Code 1907, §§ 2391-2400. This Court affirmed an assessment of taxes under that act, *Southern Ry. v. Greene*, 160 Ala. 396, 49 So. 404 (1909), but the Supreme Court of the United States reversed, 216 U.S. 400 (1910), holding that the tax violated the Equal Protection Clause.

The legislature responded by enacting a franchise tax on both domestic and foreign corporations, in the manner prescribed by the respective constitutional sections. Acts 1915, Act No. 464. In *Louisville & N. R.R. v. State*, 201 Ala. 317, 318, 78 So. 93, 94 (1918),[3] the Court held that the tax did not "operate as an arbitrary discrimination against foreign corporations." The statute levied a tax on every domestic corporation, with exceptions as provided in § 229, of 40 cents per $1,000 "of its paid-up capital stock" and a tax on foreign corporations, with exceptions as provided in § 232, of 40 cents per $1,000 "on the amount of capital actually employed in this state." The Court distinguished the tax from the one invalidated in *Southern Ry. v. Greene, supra*, and included the following discussion of the history of §§ 229 and 232:

> "The act, both as to foreign and domestic corporations, employs the exact language of the Constitution, and if we look to the journal and debates of the constitutional convention upon the adoption of sections 229 and 232, we think it is well demonstrated that the difference between the two was made for the sole purpose of avoiding a discrimination against foreign corporations. The committee on corporations reported to the convention section 229 as it now appears in our Constitution, and section 232, as reported, contained the words '*in proportion to the amount of*

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[3] Appeal dismissed, 248 U.S. 533 (1918).

its capital stock.' An amendment was offered by Mr. Kyle, changing the words as italicized so as to read, '*shall be based on the actual amount of capital employed in this state.*' In support of this amendment Mr. Kyle, among other things, said:

> " 'For instance, take the Tennessee Coal & Iron Co. They have a capitalization of $30,000,000. They have large property in Tennessee as well as in Alabama. Therefore it should not be required of them, or any other corporation of like character, to pay its franchise tax upon property they own in other states. Take the Southern Iron & Foundry Company. They have a capitalization of $600,000 and own a small plant in this state. The main plant is in Tennessee. This amendment would reach all the capital they had in use in Alabama, but they would not have to pay upon the entire capital stock. The Western Union Telegraph Company, with $80,000,000 capital, would have to pay on the capital of $80,000,000 instead of what she has in this state. So this reaches the matter and makes it the property in possession of the state. The committee will accept that I hope.'

"The section as amended was then adopted. Of course, this court is not bound by the debates of the constitutional convention, but they are often looked to, and the one in question is very persuasive that the framers of our organic law did not intent to discriminate against foreign corporations as to a franchise tax and adopted the foregoing amendment to section 232 for the sole purpose of avoiding a discrimination by fixing the basis for the franchise tax upon the amount of property actually employed in this state."

The constitutional convention, therefore, expressly amended the corporation committee's proposal that became § 232, so that a foreign corporation's franchise tax would be calculated according to the portion of its capital employed in this state, but it did not make such a change in the same committee's identically worded proposal for the tax on domestic corporations. The convention clearly envisioned that, absent the offered amendment, the proposed tax "in proportion to the amount of capital stock" would be calculated on the entire capitalization of the corporation. No such amendment was offered for the proposal that became § 229, so that section of the constitution directs the legislature to impose the tax on a domestic corporation's "capital stock" and does not provide for a reduction of a domestic corporation's franchise tax in proportion to its out-of-state capital.[4]

It can also be seen from the quoted portion of *Louisville & N. R.R.* that the Court considered the term "paid-up capital stock" to be synonymous to the term "capital stock." The Court later upheld franchise taxes imposed on a domestic corporation "with a paid-up capital stock of $87,400,000," even though the corporation was in receivership. *State v. Bradley*, 207 Ala. 677, 678, 93 So. 595, 596 (1922).

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[4] The United States Supreme Court upheld, against equal protection, commerce clause, and due process challenges, Alabama's non-apportioned tax on the capital stock of a domestic corporation doing a majority of its business in Tennessee and Mississippi. *Kansas City, Memphis, & Birmingham R.R. v. Stiles*, 242 U.S. 111 (1916). The Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on The Judiciary, House of Representatives, June 30, 1965, Vol. 3, part IV, "Capital Stock Taxes," p. 909, concludes its discussion of the lack of a requirement of apportionment of states' taxes on domestic corporations by stating: "Today more than half of the capital stock tax States allow apportionment, but in seventeen of thirty-seven States domestic corporations must still pay tax measured by their entire capital." (Footnote omitted.)

"The Constitution of 1901 (section 229, quoted ante) and the laws of Alabama impose 'franchise taxes' upon all existing domestic corporations, aside from exceptions of classes of which this corporation is not a member. Given the existence of a domestic corporation, the rate and tax period being prescribed by law as has been done, the only possible inquiry is the amount of the paid-up capital stock of the corporation. No assessment of the charge or imposition of this 'franchise tax' is required or even possible under the laws, organic and statutory, of this state. Assessment, for purpose of taxation—a quasi judicial act—was defined in *Perry County v. R.R. Co.*, 58 Ala. 552, as consisting of a listing and an appraisal of the value of the items of property listed. Neither of these acts is requisite to the imposition or exaction of a 'franchise tax' on domestic corporations; the laws of the state themselves affecting to impose the charge and exact its payment in expressly stipulated circumstances. The ascertainment, in a concrete case, of the monetary measure of the 'franchise tax' imposed and demandable, upon the basis of the domestic corporation's paid-up capital ~~stock~~, is not a judicial, but a ministerial, act of the governmental authority charged with the duty of performing that service. *Grider v. Tally*, 77 Ala. 422, 424-426, 54 Am. Rep. 65.

"A duty 'is ministerial when the law exacting its discharge prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act.' *Grider v. Tally, supra.*

> "In ascertaining the sum of the paid-up capital stock for the calculation of the amount of the 'franchise tax' demandable of a domestic corporation, no judicial discretion or judgment is left to the body charged with that duty."

Id., 207 Ala. at 679, 93 So. at 596.

Thus, in the course of discussing whether a corporation in receivership was subject to the franchise tax, the Court firmly established the interpretation that the franchise tax would be measured by the corporation's paid-up capital stock, with no other factors taken into consideration. In 1920, the Attorney General issued an opinion stating that surplus capital was not to be included within the term "capital stock" as used in § 229. Atty. Gen.'s Biennial Report for 1919-20, p. 570. We do not see that that interpretation is necessarily a correct interpretation of § 229.

The Court in *Ellis v. W. A. Handley Mfg. Co.*, 214 Ala. 539, 540, 108 So. 343, 344 (1926), a case involving the foreign corporation franchise tax, noted:

> "We are, of course, aware of the fact that in some instances 'capital' and 'capital stock' are used interchangeably, but such cannot be the case here, as section 229 of the Constitution, in dealing with domestic corporations, expressly bases the franchise tax on the 'capital stock,' while section 232 bases the franchise tax on foreign corporations on the 'actual amount of capital employed in this state.' "

See, also, *State v. Guaranty Savings Building & Loan Ass'n.*, 225 Ala. 481, 144 So. 104 (1932), holding a domestic building and loan association subject to a franchise tax on its paid-in (or paid-up—the two terms are synonymous) capital stock, and holding a statute declaring the contrary unconstitutional under § 229. That decision was overturned by Amendment 27, ratified in 1935, which ex-

empted such institutions and retroactively ratified the statutes declaring such an exemption.

In 1982, the Court of Civil Appeals followed *State v. Bradley*'s holding that a domestic corporation in receivership is subject to the franchise tax.[5] *State, Dep't of Revenue v. Forrester*, 419 So. 2d 231 (Ala. Civ. App. 1982). The Court also reiterated *Bradley*'s statements that the tax on a domestic corporation is based on the amount of its capital stock, not on the value of its property:

> "The franchise tax on domestic corporations is based upon the amount of capital stock of the corporation and not upon the value of the corporate property. Article XII, § 229, Constitution of Alabama (1901); §§ 40-14-40 and -41.1, Code 1975. Alabama's franchise tax upon Alabama corporations 'is imposed upon corporate existence, not corporate activity or exerted corporate function.' *State v. Bradley*, 207 Ala. 677, 93 So. 595 (1922). In that case it was determined that the appointment of a receiver did not work a dissolution of the corporation and, although under receivership, the franchise tax was collectible."

Id., 419 So. 2d at 233.

Again in 1987, the Court of Civil Appeals cited the principle that § 229 allows imposition of a tax only on the amount of a domestic corporation's capital stock. The court held that "a *nonstock* member association" is not subject to the tax because it has no capital stock on which the tax can be imposed. *State v. Raymond M. Sims, D.M.D., P.A.*, 519 So. 2d 523, 523 (Ala. Civ. App. 1987) (emphasis in original), *writ quashed*, 519 So. 2d 524 (Ala. 1987).

Although these recent cases by the Court of Civil Appeals reaffirm the principle that a domestic corpora-

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[5] That principle from *Bradley* was enacted into the franchise tax article and is now found at § 40-14-56.

tion's franchise tax must be in proportion to the amount of its capital stock, they do not re-examine, in the light of the changed treatment of corporate stock, the old holdings that "capital stock" includes only paid-in capital stock. We see nothing in § 229 that necessarily limits the term "capital stock" to "paid-in capital stock." Although that interpretation may have been appropriate at one time, there is nothing in § 229 that prevents the legislature, should it so choose, from assigning to "capital stock" a meaning other than paid-in value.

There are many more cases applying the franchise tax on foreign corporations than there are applying the tax on domestic corporations, and they have concerned questions such as whether the property or business sought to be included in the tax base was in fact "capital employed" in this state by the foreign corporation, and, if so, how to measure its value and apportion it to the tax imposed in this state. See, e.g., *Ellis, supra*; *State v. National Cash Credit Ass'n*, 224 Ala. 629, 141 So. 541 (1932); *State v. Anglo-Chilean Nitrate Sales Corp.*, 225 Ala. 141, 142 So. 87 (1932), *reversed*, 288 U.S. 218 (1933); *Investors' Syndicate v. State*, 227 Ala. 216, 149 So. 83 (1933); *State v. Southern Natural Gas Corp.*, 233 Ala. 81, 170 So. 178 (1936), *affirmed*, 301 U.S. 148 (1937), *Stato v. Pullman-Standard Car Mfg. Co.*, 235 Ala. 493, 179 So. 541 (1938); *Alabama Textile Products Corp. v. State*, 263 Ala. 533, 83 So. 2d 42 (1955).

At least partially in response to the holdings in some of the above cases, the legislature passed numerous amendments to the foreign corporation franchise tax, refining the definition of "capital employed" and providing certain exemptions. See, e.g., Acts 1935, No. 194; Acts 1955, Second Ex. Session, No. 74; Acts 1961, No. 912; Acts 1963, No. 255; Acts 1965, No. 764; Acts 1969, No. 1138; Acts 1971, First Ex. Session, No. 103; Acts 1971, No. 499; Acts 1973, nos. 469 and 1173; Acts 1985, No. 85-412; Acts 1986, No. 86-214.

In contrast, the only amendments to the domestic franchise tax before 1983 simply raised the millage rate in conjunction with equal increases in the millage rate of the foreign corporation franchise tax. Acts 1935, No. 194; Acts 1955, Second Ex. Session, No. 74; Acts 1971, First Ex. Session, No. 103.

The legislature maintained the same rate on the two taxes until 1983, when it increased the rate for domestic corporations to $10 per $1000 of capital stock, or a minimum of $50. Acts 1983, No. 83-745. On the motions for summary judgment, the parties submitted the depositions of James Sizemore, the Commissioner of the Department of Revenue, and Ernest Broadhead, the Chief of the Department's Division of Franchise Tax. Broadhead explained the genesis of the increase in the domestic tax rate. He explained that in 1983, at the request of some legislators, he drafted a proposed amendment of the domestic franchise tax that would have imposed that tax in the same manner as the tax on foreign corporations. The draft included a bill that would have proposed an amendment to § 229. When it became clear that those bills would not pass, Broadhead said, he hastily drafted a substitute bill, which became Act No. 83-745.

Long before these efforts to amend § 40-14-40, the legislature had passed a tax on the stock of domestic corporations that seems clearly to have been designed to offset the reduced base of the domestic franchise tax. Sections 40-14-40 and -41 trace back to the General Revenue Act of 1935, Act No. 194. In that same Act, the legislature imposed a tax on the stock of domestic corporations.[6] That stock tax is now codified at § 40-14-70 et seq. Its approach for valuing the stock is somewhat similar to the provisions

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[6] Previous versions of the franchise taxes and the corporate stock tax had also been enacted in General Revenue Acts that were, according to the practice of the time, not codified. In their present codification, they trace to the Act of 1935.

in § 40-14-41 for valuing the capital employed in this state by a foreign corporation.

Although the domestic corporate stock tax is nominally imposed on the stockholders, not the corporation, § 40-14-73 allows a corporation to avoid filing a list of its shareholders by agreeing to pay the tax itself. Commissioner Sizemore stated in his deposition that all domestic corporations pay the tax, and Broadhead stated the same thing in an affidavit. There was evidence presented on the summary judgment motions showing the relationships among the foreign corporation franchise tax, the domestic corporation franchise tax, and the domestic corporation stock tax, as we shall show below.

The following overview of corporate franchise/capital stock taxes was published in 1965 as Chapter 29 of the Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on The Judiciary, House of Representatives, June 30, 1965, Vol. 3, Part IV. It provides an informative background to the detailed history of such taxes in Alabama. The excerpts here are from pp. 903-911:

> "At the present time thirty-six States [fn.1] and the District of Columbia [fn.2] raise revenue from businesses in corporate form through taxes measured in one way or another by the amount of the corporation's capital. Thus, in terms of the number of States employing it, the capital stock tax is comparable to the corporate net income tax and the sales tax.
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> ". . . .
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> "At the outset, it should be noted that taxes on or measured by corporate capital are levied under various names, such as 'Corporation Franchise Tax,' 'Corporation License Tax,' or 'Corporation Business Tax.' Although they employ a

wide range of techniques for valuing the tax base, all are annually recurring levies measured by the value of a corporation's capital, as distinct from its property. These taxes will be treated together in this report under the term 'capital stock taxes.' They have been selected for study as a group because they raise a common problem for multistate business. Since the tax is computed by reference to the entire value of the corporation's capital, it becomes necessary to determine what proportion of that value is taxable in each State. It is this common problem of division of the base which more than any other makes these taxes suitable for study as a group.

"Despite the wide variety among capital stock taxes in techniques for valuing the tax base, the bases employed fall readily into two general categories. In one category are narrow bases taken from the corporation's statement of capital, either authorized shares or outstanding (or issued) shares, generally valued at par in the case of par-value shares and at various arbitrary amounts, such as $100 a share, in the case of no-par shares. Tax bases of this type will be classified under the term 'capital-account' base. In the other category are broader bases reflecting in a variety of ways historical earning capacity or value as a continuing business enterprise. These bases are generally defined in terms of balance sheet items with some adjustments for more realistic valuation. They may be measured by corporate net worth (*i.e.*, the excess of assets over liabilities); or by the market value of the corporation's shares. All of these bases will be classified under the term 'capital-value' bases. Also included with the capital-value bases are the so-called 'corporate excess' taxes, although their

closer relation to property taxes requires separate historical treatment in this chapter.

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"Beginning about the turn of the century, the number of capital stock tax States grew rapidly. In 1902, there were thirteen such States. By 1912, the number had reached twenty-five, and by 1929 it was thirty-three. The surge of capital stock taxes appears to have crested by 1929; since then the total has increased by only four.

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"This brief history demonstrates how the capital stock tax grew out of two very distinct forms of tax, each of which has left traces that are important in any appraisal of the present system. On the one hand, there were the one-time incorporation and entrance fees exacted for the privilege of existence or operation as a corporation. These fees, even if not flat amounts, are measured with reference only to the technical corporate structure. The capital account taxes today appear to be such fees made annually recurring. This form of tax base is readily ascertainable, but takes no account of the going-concern value of the corporation.

"On the other hand, there were the ad valorem property taxes. Today's capital value taxes appear to have evolved from these property taxes, and are measured by a base which is essentially the entire corporation valued as an entity. Tax bases of this kind are not calculable according to precise statutory rules, but instead their definition consists of no more than a generalized standard for valuation. Indeed, in many States the tax authorities have power to consider any facts

found relevant in reaching a correct valuation and to revise the taxpayer's valuation and make an additional assessment.

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"The capital stock tax has retained features which inhibit its revenue-producing potential. The most important of these is the continued use by half of the States of capital-account bases, which fail to reflect any element of going-concern value.

"1 Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and West Virginia.

"2 As in other parts of this report, the District of Columbia is treated hereafter as a State."

In the terms of that report, one could say that § 40-14-40 imposes on domestic corporations a capital-account tax, and that §§ 40-14-41 and -70 impose capital-value taxes.

Given these facts, we now turn to a discussion of the standards that have been developed by the United States Supreme Court for applying the Equal Protection and Commerce Clauses to questions similar to the ones presented here.

Equal Protection of the Laws

The Equal Protection Clause provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. 14. The term

"person" was long ago held to apply to corporations. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886); and see *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

State tax legislation is given great deference before it will be found to be in violation of the Equal Protection Clause.

> "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interest. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. . . . . 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' "

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526-27 (1959), quoting *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930).

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973) (footnote omitted).

> "In *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590, a State laid an ad valorem tax of 50¢ per $100 on deposits in banks outside the State and only 10¢ per $1,000 on deposits within the State. The classification was sustained against the charge of invidious discrimination, the Court noting that 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.' *Id.*, at 88, 60 S.Ct., at 408. There is a presumption of constitutionality which can be overcome 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' *Ibid.* And the Court added, 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' *Ibid.* That idea has been elaborated. Thus, in *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed.1245, the Court, in sustaining an unemployment tax on employers, said:

> " 'A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.' *Id.*, at 510, 57 S.Ct., at 872."

Id., at 364-365 (footnote omitted). See, also, *City of New Orleans v. Dukes*, 427 U.S. 297 (1976).

The above-quoted standards of review were also applied in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983).

In equal protection analysis of challenges to tax statutes, the basic test is that a classification for taxing purposes will be upheld if it is rationally related to a legitimate state purpose, "a relationship that is not difficult to establish." *Metropolitan Life Ins. Co., supra*, 470 U.S. at 881; *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648 (1981); *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371 (1978); *Huges v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

> "In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the chal-

lenged classification would promote that purpose?"

Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981).

This case is unlike *Metropolitan Life Ins. Co. v. Ward*, *supra*, because that case involved premium taxes that were facially discriminatory against foreign insurance companies: a three or four percent rate was imposed on premiums collected by foreign companies, but only a one percent rate was imposed on domestic companies. Here, a finding of discriminatory treatment cannot be made from the face of the statutes themselves, but only by consideration of the *effect* of the taxes.

Commerce Clause

The Commerce Clause provides: "The congress shall have power to . . . regulate commerce . . . among the several states." U.S. Const. Art. I, § 8, cl. 3. The prohibitions of the Commerce Clause apply even in the absence of action by Congress on the principle that the clause itself prohibits an undue burden on interstate commerce by the states. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977); *Freeman v. Hewit*, 329 U.S. 249 (1946).

"No state, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Boston Stock Exchange*, 429 U.S. at 328, quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984).

The Court has recently changed its analysis of the application of this clause to tax statutes. The current test is that a tax must (1) have a sufficient nexus to the taxing state, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be reasonably related to the

services provided by the taxing state. As part of the apportionment test, the Court has held that a tax must be internally consistent, that is, that it must be susceptible of application by all of the states without burdening interstate commerce. *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dept. of the Treasury*, ___ U.S. ___, 109 S.Ct. 1617 (1989); *Goldberg v. Swoot*, ___ U.S. ___, 109 S.Ct. 583 (1989); *American Trucking Ass'ns, Inc. v. Schainer*, 483 U.S. 266 (1987); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Applications of the Standards to this Case

We note here that the ultimate question in applying either equal protection or commerce clause analysis to these facts is virtually the same. The foreign corporation franchise tax has a nexus to this state and is apportioned fairly, because only such portion of the corporation's capital as is employed in this state forms the base for the franchise tax. It is reasonably related to services provided by this state, because the corporate function depends upon the provision of services such as roads, police and fire protection, etc. Therefore, the only element of the commerce clause test that is at issue here is the discrimination against interstate commerce test. While there are certain differences between this test and the test for application of the Equal Protection Clause, they are sufficiently similar that the bulk of our analysis will not treat them separately.

The question, as we see it, is whether the franchise tax on foreign corporations *invidiously* discriminates against them by imposing a grossly disproportionate tax on them for no other reason than to provide a competitive advantage to domestic corporations. We emphasize the term "invidiously" because the tax will be sustained if its classifications are rationally related to a legitimate state purpose and because, in enacting taxing statutes, legislatures

are not required to reach equality with mathematical precision.

> "[A] statutory classification impinging upon no fundamental interests, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it. *Williams v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 925 (1955). That [a state] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional. See *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed. 2d 828 (1966)."

Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 813 (1976); *Lehnhausen v. Lake Shore Auto Parts, supra*; *Allied Stores of Ohio, Inc. v. Bowers, supra.*

The guiding principles for courts to apply when legislative acts are challenged as unconstitutional were ably expressed in *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 9, 18 So. 2d 810, 815 (1944):[7]

> "Uniformly, the courts recognize that this power is a delicate one, and to be used with great caution. It should be borne in mind, also, that legislative power is not derived either from the state or federal constitutions. These instruments are only limitations upon the power. Apart from limitations imposed by these fundamental charters of government, the power of the legislature has no bounds and is as plenary as that of the British Parliament. It follows that, in passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity,

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[7] Appeal dismissed, 325 U.S. 450 (1945).

> and seek to sustain rather than strike down the enactment of a coordinate branch of the government. All these principles are embraced in the simple statement that it is the recognized duty of the court to sustain the act unless it is clear beyond reasonable doubt that it is violative of the fundamental law. State ex rel. Wilkinson v. Murphy, 237 Ala. 332, 186 So. 487."

See, also, *Home Indemnity Co. v. Anders*, 459 So. 2d 836 (Ala. 1984); *Crosslin v. City of Muscle Shoals*, 436 So. 2d 862 (Ala. 1983); *Thorn v. Jefferson County*, 375 So. 2d 780 (Ala. 1979); *Mobile Housing Bd. v. Cross*, 285 Ala. 94, 229 So. 2d 485 (1969).

Thus, when testing the constitutionality of a statute, the only question for the Court to decide, under the constitutional separation of powers, is one of legislative power, not of legislative expediency or legislative wisdom. All questions of propriety, wisdom, necessity, utility, and expediency are exclusively for the legislature to determine and are matters with which the courts have no concern. *Alabama State Federation of Labor v. McAdory, supra*; *Fireman's Fund American Ins. Co. v. Coleman*, 394 So. 2d 334, 352-53 (Ala. 1980) (Shores, J., concurring in the result); *Reed v. Brunson*, 527 So. 2d 102, 116 (Ala. 1988); *Friday v. Ethanol Corp.*, 539 So 2d 208, 211 (Ala. 1988).

Our legislature is faced with a difficult problem of imposing a franchise tax, because §§ 229 and 232 prescribe different methods of imposing the tax. Section 229 makes no allowance for apportionment of the domestic corporation franchise tax according to the amount of a corporation's capital stock that is attributable to activities within the state, while § 232 requires such an apportionment for foreign corporations, as it must under the Commerce Clause. The problem is compounded by the historical developments that "capital stock" in § 229 was held to mean only paid-in capital stock and that that measure of capital

stock is no longer as appropriate a measure of the actual capitalization of a corporation as it was when the first franchise tax statutes were enacted pursuant to §§ 229 and 232.

Thus, we find that the plaintiffs' claims of unequal treatment and discrimination against them are answered by two factors in the record that are not taken into account in the opinion of the trial court or that of the Court of Civil Appeals, and which presumably have been taken into account by the legislature in its efforts to enact nondiscriminatory taxes. The first is that, while it is true that there are more domestic corporations doing business in this State than there are foreign corporations doing business in the State and that, as is shown in the opinions below, those domestic corporations paid less tax, it is also true that the foreign corporations, although smaller in number, actually employ more capital in this State than domestic corporations do. The second is that the discrepancy in the franchise tax diminishes substantially when the tax on the stock of domestic corporations is taken into account.

Both of these points are illustrated by the affidavit of Ernest Broadhead:

> "My name is Ernest J. Broadhead. I am presently the Chief of the Franchise Tax Division of the Alabama State Revenue Department, which office I have held since July, 1983. In this position, I have become acquainted with the taxation of foreign and domestic corporations for franchise tax purposes in Alabama. Foreign corporations pay franchise tax based on their capital employed in the State of Alabama and pay no tax on their corporate shares of stock, whereas domestic corporations pay both a franchise tax based on the amount of their capital stock and a share stock tax which is an ad valorem tax on the corporate shares of stock. While the legal

incidence of the share tax is on the stockholder, in practice the share tax is always paid by the corporation. I know of no incidence in which the share stock tax has been paid by the shareholder as opposed to the corporation. The following table shows the impact of the share tax in Alabama:

"1. Number of domestic share tax assessments by year

"2. Estimated total tax using average state millage rate (.038)

"3. Estimated average per corporation.

	"1987	*1986*	*1985*	*1984*
"1.	45,048	42,902	41,348	39,501
"2.	$13,563,668	$11,470,954	$11,197,983	$11,517,468
"3.	301.09	267.37	270.82	291.57

"The above figures are conservative because they are based on the statewide tax rate of 38 mills. Proportionally more corporations are located in larger metropolitan areas which usually have higher millage rates. For instance, the millage rate as of October 1, 1986, in Huntsville was 68.5; in Birmingham was 70.6; in Mobile was 51.5; and in Montgomery was 34.5.

"The study conducted by the Department of Revenue, which is a part of the record in this case, shows that for the tax year 1983, 38,772 domestic corporations and 11,234 foreign corporations paid franchise taxes. Had both the foreign and domestic corporations paid franchise taxes based on the capital employed in this state at the rate of $3.00 per $1,000.00 capital employed, an average domestic corporation would have paid $991.70, while an average foreign corporation would have paid $4,148.79. This shows that for-

eign corporations on average employ in excess of four times the amount of capital in this state as domestic corporations. It further shows that all the capital employed by all the domestic corporations in this state is only 45% of the amount employed by all foreign corporations. It can be seen from this that one of the reasons that the average tax for foreign corporations exceeds that of domestic corporations is that the foreign corporations are bigger and employ more capital and that many of the domestic corporations are small by comparison to the foreign corporations.

"It has been my experience that foreign corporations can manipulate the amount of franchise taxes they pay in Alabama merely by forming domestic corporate subsidiaries to do business in this state or by becoming Alabama corporations themselves."

The State filed a brief in support of *its* motion for summary judgment that included the following argument based on Broadhead's affidavit:

"Before a tax is subject to the rational basis test, the Taxpayer must initially show that discrimination exists. The Taxpayers have attempted to do this through the use of statistics showing that Alabama receives more franchise taxes on average from foreign corporations than it does from domestic corporations. While this may be true, it is also true that a particular corporation's franchise tax liability is determined by its capital structure and corporate make-up, and it also depends to a large extent on the size of the corporation. The Affidavit of Ernest J. Broadhead, Chief of the Franchise Tax Division, Department of Revenue, shows that for the tax year 1983, 38,772 domestic corporations and

11,234 foreign corporations paid franchise taxes. Had both the foreign and domestic corporations paid franchise taxes based on the capital employed in this state at the rate of $3.00 per $1,000 of capital employed, an average domestic corporation would have paid $991.70, while an average foreign corporation would have paid $4,148.79. What these figures mean is that foreign corporations on average employed in excess of four times the amount of capital in this state as domestic corporations. This accounts for some of the discrepancy between what an average foreign corporation pays in franchise taxes and what an average domestic corporation pays in franchise taxes. The Affidavit also shows that all the capital employed by all the domestic corporations in this state constitutes only 45% of the amount employed by all foreign corporations. It can readily be seen from this that one of the reasons that the average tax for foreign corporations exceeds that of domestic corporations is that the foreign corporations are bigger and employ more capital and that many of the domestic corporations are small by comparison to the foreign corporations doing business within the State of Alabama.

"This fact can be illustrated using the statistics it he record in this case. Assume that the capital employed by a corporation in Alabama is indicative of its size and that therefore foreign corporations are on average approximately 4.5 times as large as domestic corporations ($4,148.00 versus $991.00). Exhibit B to the Rawls Brief shows that for the year 1985, an average domestic corporation paid $303.28 in franchise taxes while an average foreign corporation paid $3,685.40 in franchise taxes. Assume, however, that the domestic corporation also paid $270.82 in share

taxes, as shown by the Affidavit of Broadhead attached to the State's Motion for Summary Judgment. Adding the $303.28 to the $270.82 gives a sum of $574.10 in total taxes paid by the domestic corporation. If you multiply the $574.10 paid by domestic corporations times a factor of 4.5 to take into account the discrepancy between the relative sizes of domestic versus foreign corporations, the domestic corporation, were it the same size as the foreign corporation, would have paid $2,583.45 in taxes, as opposed to the $3,685.40 paid by the foreign corporation. While these two amounts are not equal, the discrepancy between the two in no way approaches the discrimination which the Plaintiffs would have this Court believe exists.

"The figures for the 1984 tax year are even more compelling. In that year domestic corporations paid a total of $325.29 in franchise taxes and $291.57 in corporate share taxes, for a total of $616.86. If one multiplies this figure times the factor of 4.5 one may see that a domestic corporation of a size comparable to an average foreign corporation would pay a total of $2,815.87 in taxes. A foreign corporation in that same year paid on average $3,323.08 in franchise taxes. The domestic share tax figures are estimates based on the average statewide tax rate of 38 mills. It stands to reason that proportionally more corporations are located in the large metropolitan areas, which have a higher millage rate. For instance, as of October, 1986 Huntsville had a millage rate of 68.5; Birmingham had a rate of 70.6; Mobile had a rate of 51.5 and Montgomery had a rate of 34.5. Had the estimates been weighted toward the higher millage rates which exist in the larger cities, the figures might well show that

the total tax paid by domestic corporations equals that of foreign corporations. In short, the apparent discrimination argued by the Plaintiffs does not in reality exist.

"The Taxpayers make much of the fact that domestic corporations can manipulate the amount of franchise tax they must pay by reducing the amount of their capital stock. However, foreign corporations can likewise manipulate the amount of franchise taxes they must pay merely by forming domestic corporate subsidiaries or by becoming domestic corporations themselves. According to Broadhead, this has in fact been done."

We note that Broadhead inadvertently stated that his figures showed that domestic corporations employed only 45% of the capital employed by foreign corporations. What his figures in fact show is that domestic corporations employ 45% of the entire capital employed in the state by corporations while foreign corporations employ 55%.[8]

Broadhead's affidavit shows that his estimates of the stock tax are almost certainly low, because Birmingham, Huntsville, and Mobile have tax rates[9] that are substantially higher than the average figure used in Broadhead's calculations, and those three cities would certainly have the greatest concentration in the state of domestic corporations with high values of corporate stock. This means

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[8] As follows: 38,772 domestic corporations x $991.70 average tax on a capital-employed base at a 3-mill rate = $38,450,192.40 total domestic franchise tax; 11,234 foreign corporations x $4,148.79 average tax on the same base and rate = $46,607,506.86 total foreign franchise tax. $38,450,192.40 is 45.2% of the $85,057,699.26 total franchise tax. Because the tax in these calculations varies only with capital employed, the proportionate shares of capital employed would be the same as the proportionate shares of tax.

[9] The state and county millage rates are constant, so only the municipal rates vary.

both that the figures in Broadhead's affidavit for tax paid by domestic corporations are low and that the calculation of the exact amounts would be so difficult that deference to the legislative judgment on the method for equalizing the relative burdens on domestic and foreign corporations is in order.

Perhaps the most significant fact about these calculations is that they are based on figures that Broadhead derived by examining domestic corporations' stock tax returns. This illustrates the point that the legislature has instituted the domestic stock tax to overcome the perceived restrictions imposed by § 229 (the absence of an apportionment provision and the "paid-in capital" interpretation) and to reach a tax base that is more nearly equivalent to that of foreign corporations. Also of great significance is the fact that, in deriving a hypothetical "capital employed" franchise tax for domestic corporations, Broadhead was not able to apply an allocation factor:

> "The one factor . . . that we were not able to include that would normally be a part of this is the allocation. So an assumption was made that all of the tax was—on these generally smaller domestic corporations were Alabama firms or had a one hundred percent capital employment factor in Alabama."

Thus, his figure of $991 as a "capital-employed" tax on domestic corporations is obviously high, and the discrepancy between the capital employed by domestic and foreign corporations is larger than his calculations show it to be and, correspondingly, the discrepancy in allocation of the tax burden is smaller than his calculations show it to be.

The point that the legislature has designed the domestic stock tax to complement the foreign franchise tax is made also by a comparison of § 40-14-41 with § 40-14-70. Although the definition of capital in § 40-14-41(b) is somewhat different from the factors set out in § 40-14-70(a)

and (c) to be used in valuing a domestic corporation's stock, those methods of valuation reach largely the same elements of corporate worth. The investments of domestic corporations in other states are deducted from the value of the corporate stock before the tax is calculated, § 40-14-70(d)(1), so the domestic stock tax is apportioned to some degree as the foreign corporation franchise tax is apportioned. Another fact that shows that the legislature has treated the stock tax on domestic corporations as corresponding to the franchise tax on foreign corporations is that recent amendments have added the same deductions to both taxes. Sections 4-14-41(d)(2)c and 40-14-70(d)(1) allow deductions for investments in air and water pollution control devices. Sections -41(d)(2)d and -70(d)(3) allow deductions for investments in "qualifying counties," that is, counties with high unemployment rates. Furthermore, the Department of Revenue administers the corporate stock tax through a Shares Tax Section within the Franchise Tax Division.

The United States Supreme Court has upheld taxing statutes that appeared to discriminate against interstate commerce by holding that the state's tax scheme compensated for the tax by a substantially equivalent tax on intrastate commerce. *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932) (use tax on out-of-state purchases brought into state compensated for by sales tax on in-state purchases); *Alaska v. Arctic Maid*, 366 U.S. 199 (1961) (exemption from tax on Alaska fish catches for fish to be canned in Alaska justified because of tax on Alaska fish canners); *Public Util. Dist. v. Washington*, 82 Wash. 2d 232, 510 P.2d 206, appeal dismissed for want of a substantial Federal question, 414 U.S. 1106 (1973) (deduction, from tax on sale of electric power for sales for resale within state not discriminatory because resales within state would be subject to the same tax).

The above-cited cases are analyzed at J. Hellerstein, *State Taxation*, vol. 1, "Corporate Income and Franchise

Taxes," paragraph 4.12[5], pp. 147-48 (1983). Hellerstein questions the rationales of such cases at pages 149-51 and, in the 1988 cumulative supplement, notes that more recent United States Supreme Court cases have not allowed the comparison of complementary taxes to validate taxes that, by themselves, impose an undue burden on interstate commerce. *American Trucking Ass'ns., Inc. v. Scheiner*, 483 U.S. 266 (1987); *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981).

Hellerstein elsewhere says, however, that a capital stock tax *is* a corporate franchise tax:

> "The capital stock tax, which has had a long history in State taxation, has its roots in the property tax. The earliest form of general corporation tax in this country, the corporate excess tax, was not a special tax but a modification of the general property tax. It was a levy on the value of a corporate business in excess of the value of its assets. The excess included goodwill, doing business value, and other factors that are reflected in the market value of the corporation's stock. At first, this intangible 'corporate excess' value was assessed and taxed to the shareholders. Subsequently, it was levied on the corporations themselves. This form of corporate taxation has largely given way to the capital stock tax.
>
> "The capital stock tax is typically an annual franchise tax, imposed on domestic corporations for the privilege of existing as a corporation, and on foreign corporations for the privilege of doing business, or the actual conduct of business, within the taxing State. It is usually measured by the value of the business as a going enterprise, determined on a book value basis, although in some

> States an attempt is made to utilize the market value."

Hellerstein, *op. cit.*, paragraph 11.1, pp. 691-92 (footnotes omitted).

Because of the perceived restrictions in our Constitution, the legislature has divided the franchise tax on domestic corporations into the "franchise tax" as such and the corporate stock tax. No such restrictions exist with respect to foreign corporations, so the franchise tax on those corporations has not been so divided. There is no stock tax on foreign corporations in Alabama.

When the franchise tax on foreign corporations is compared to the aggregate of the franchise tax and the corporate stock tax on domestic corporations, taking into account the large amount of capital employed in this state by foreign corporations and the relatively smaller amount employed by domestic corporations, the alleged unequal treatment of and discrimination against foreign corporations diminishes to a point that no discrimination of constitutional significance exists. The legislature is not required to reach equality with mathematical exactness, and legislation will be presumed constitutional unless shown otherwise by clear and convincing proof.

Even assuming that the lack of uniformity in the taxes on domestic and foreign corporations rose to a level of discrimination that would invoke equal protection or commerce clause analysis, we would hold that § 40-14-41 does not violate those provisions, for the following reasons.

The Court held in *Louisville & N. R.R. v. State*, *supra*, that the purpose behind §§ 229 and 232 and the taxes enacted pursuant thereto was to collect franchise taxes that did not discriminate against foreign corporations. That is concededly a legitimate state purpose. We find that the purpose behind the historical amendments to the foreign corporation franchise tax, the domestic corporation fran-

chise tax, and the domestic corporation stock tax has been to maintain that lack of discrimination as nearly as was feasible within the framework imposed on the legislature by §§ 229 and 232 and the cases interpreting them. In determining whether "it was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose," *Western & Southern Life, supra*, we need only inquire whether the legislature engaged in "invidious" or "hostile and oppressive discrimination," *Lehnhausen, supra*.

There is no showing of invidious discrimination or hostile purpose. Rather, a tax that was originally imposed under an express state constitutional mandate not to discriminate against foreign corporations, and that originally did not so discriminate, developed, in its application and over time, to be somewhat more discriminatory. This came about, not through an increase of the tax on foreign corporations, but by a decrease of taxes paid under the franchise tax by domestic corporations. The decrease of the domestic franchise tax came about, not through legislative action, but through actions taken by domestic corporations to pay less money in franchise taxes.

It can be seen that the legislature, rather than invidiously fostering any such discrimination, took steps within the perceived restrictions of the Alabama Constitution to offset any unequal treatment, primarily by the use of the corporate stock tax. In the ongoing efforts to maintain the constitutionally required level of equal treatment, certain legislators introduced bills in the 1983 session that would have proposed an amendment to § 229 of the Constitution and thereby imposed a capital-employed franchise tax on domestic corporations. When it became clear that those bills were not likely to pass, the legislature substituted a bill that raised the rate and the minimum for the franchise tax on domestic corporations.

Other than the bare fact of that legislative activity in 1983, there is no evidence that, prior to the institution of this lawsuit, the legislature had any indication that its chosen means of implementing the corporate franchise taxes was not reasonably related to the purpose of imposing a non-discriminatory tax system. Indeed, the evidence that was developed in this case shows that consideration of the relative amounts of capital employed (even under Broadhead's unapportioned analysis of a capital-employed tax on domestic corporations), together with the domestic stock tax, brings the relative tax burdens much closer than they would appear to be under the isolated facts cited in the opinion of the Court of Civil Appeals.

The Court of Civil Appeals quoted the trial court's statement that, aggregating the taxes paid and the returns filed in 1982 and 1983, 29,000 foreign corporations paid $94,000,000 in franchise taxes while 82,000 domestic corporations paid less than $10,000,000. Using these figures alone, one would conclude that the average foreign corporation paid 26.6 times more tax than the average domestic corporation. However, once Broadhead's calculations of the relative amounts of capital employed by domestic and foreign corporations (45% by the 38,772 domestics and 55% by the 11,234 foreigns filing returns in 1983) and the domestic stock tax are factored in, the relative burdens are not so disproportionate that we can say that the legislative taxing method is not rationally related to the purpose of enacting a non-discriminatory tax.

Furthermore, the plaintiffs in this case have not presented sufficient evidence under *Lehnhausen*, *supra*, to negate a number of legitimate purposes of the present legislation that are apparent to this Court and that are reasonably likely to be promoted by the statutory distinction. Legitimate purposes for the statutory distinction between foreign and domestic corporations could certainly include, in addition to the mandate of the Alabama Con-

stitution, ease of regulation and enforcement, differences in the utilization of state natural resources between foreign and domestic corporations, and differences in the employment of state residents and utilization of state services between foreign and domestic corporations.

With respect to the purpose of ease of regulation and supervision, we are aware that the legislature has enacted various provisions for the dissolution of domestic corporations or for proceeding against individual shareholders for collection of taxes that cannot apply to foreign corporations. The United States Supreme Court has held that ease of regulation can serve as a rational basis for a distinction between "persons" under equal protection analysis. See *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) (difficulty of obtaining jurisdiction over nonresident corporation justified distinction in statute of limitations); *Madden v. Kentucky*, 309 U.S. 83 (1940) (differences in ability to enforce state remedies justifies different treatment of foreign organizations); *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580 (1935) (domicile of insurer relevant to limitations statutes because such insurers' offices were generally located outside of the state); *Board of Education v. Illinois*, 203 U.S. 553 (1906) (state's greater control over domestic corporations justified a discriminatory inheritance tax as to foreign corporations).

Thus, we hold that § 40-14-41 does not violate the Equal Protection Clause.

Turning to the Commerce Clause, we must inquire whether the taxes in question impose an undue burden on interstate commerce. The weighing of factors pertinent to the franchise taxes and the corporate stock tax leads to case-by-case differences as to whether Alabama citizens wishing to incorporate a business would find it advantageous to form an Alabama corporation or to incorporate in another state. At oral argument, the amicus curiae indicated that, for example, if a business has large intangible

assets, the domestic stock tax would be so burdensome that the incorporators would inevitably choose to incorporate in another state, such as Delaware.

These considerations are affected by the kind of business the corporation would be doing in this state and by the nature of its assets, not by the distinction between intrastate business and interstate business. The same considerations would apply to the decision of a foreign corporation in deciding whether to form a subsidiary Alabama corporation to conduct its business here or to conduct its business through a division of the existing corporation.[10]

In the United States, which has 50 sovereigns that tax corporations, there will inevitably be incentives for incorporating in one state for certain types of business and in other states for other types of business, regardless of the actual place of doing business or the interstate or intrastate nature of that business. Are the Delaware tax laws that provide incentives for many businesses to incorporate there necessarily unconstitutional? We think not. Similarly, the Alabama tax laws that in some cases favor domestic incorporation and in others favor doing business here as a foreign corporation cannot be said to violate the Commerce Clause. We note that Broadhead, in response to GMAC's requests for admissions, said that if GMAC had been taxed in 1986 as a domestic corporation instead of as a foreign one, it would have paid $21,650,000 under § 40-14-40 instead of the $1,370,427 it paid under § 40-14-41.

Thus, Alabama's taxation of domestic and foreign corporations does not violate the Commerce Clause.

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[10] The fact that, when circumstances make it to their advantage to do so, foreign corporations can and do use subsidiaries to minimize payment of franchise taxes is recognized and allowed in *Consolidated Coal Co. v. State*, 236 Ala. 489, 183 So. 650 (1938); and *State v. Pullman-Standard Car Mfg. Co.*, 235 Ala. 493, 179 So. 541 (1938).

For the foregoing reasons, we hold that there is no unconstitutional unequal treatment of foreign corporations and no unconstitutional discrimination against them. Therefore, § 40-14-41 does not offend either the Equal Protection Clause or the Commerce Clause. The judgment of the Court of Civil Appeals is therefore reversed, and a judgment is hereby rendered for the State on its motion for summary judgment.

REVERSED AND JUDGMENT RENDERED.

Hornsby, C. J., and Maddox, Jones, Shores, Adams, Houston, Steagall, and Kennedy, JJ., concur.

APPENDIX B

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM 1989-90

Civ. 7246-X

James C. White, Jr., etc., and
State Department of Revenue

v.

Reynolds Metals Company, et al.

Appeals from Montgomery Circuit Court

INGRAM, Presiding Judge

These cases concern the constitutionality of Alabama's franchise tax on foreign corporations pursuant to § 40-14-41, Ala. Code 1975. On July 7, 1989, the trial court found that Ala. Code 1975, § 40-14-41, was unconstitutional because it impermissibly discriminates against foreign corporations in violation of the equal protection clause, U.S. Const. amend. XIV, § 1. On August 14, 1989, the trial court ordered that its decision be applied prospectively and denied the taxpayers' requests for refunds. All parties have appealed.

Facts

Reynolds Metals Company, GMAC Leasing Corporation, General Motors Acceptance Corporation, and General Motors Corporation (taxpayers) are foreign corporations qualified to do business in Alabama and were subject to the

levy and payment of Alabama franchise taxes pursuant to Ala. Code 1975, § 40-14-41. However, the taxpayers initiated proceedings in the Circuit Court of Montgomery County seeking to invalidate the Alabama franchise tax on foreign corporations on grounds that it impermissibly discriminates against them in violation of the equal protection clause (U.S. Const. amend. XIV, § 1) and unduly burdens interstate commerce in violation of the commerce clause (U.S. Const. art. I, § 8, cl. 3). The taxpayers' cases were consolidated and submitted to the trial court on cross-motions for summary judgment.

On the issue of the constitutionality of the franchise tax, the trial court entered a detailed and comprehensive order. That order, in part, is as follows:

> "The Court finds that § 40-14-41 facially discriminates against foreign corporations in favor of domestic corporations and likewise is discriminatory in its application. The statistics and figures quoted in the taxpayers' briefs, as supported by the discovery documents, clearly show a gross disparity of franchise taxes paid by a foreign corporation when compared to domestic corporations. In 1982 and 1983, Alabama collected almost $94,000,000 in franchise tax from approximately 29,000 foreign corporations; however, Alabama collected less than $10,000,000.00 in franchise tax from the 82,000 domestic corporations filing franchise tax returns for 1982 and 1983. The Court has considered the other facts and figures set out in the taxpayers' briefs, finds them supported by the evidence, and adopts them as a basis for its holding in this case. Significantly, the Department of Revenue (Department) has failed to advance any legitimate state purpose for this discrimination. Therefore, the Court is compelled to find that § 40-14-41 discriminates against foreign

> corporations qualified to do business in Alabama and is unconstitutional."

The trial court pretermitted any discussion of the taxpayers' argument concerning the commerce clause. Also, the trial court reserved any ruling on the appropriate remedy available to the taxpayers until after a hearing was held.

On July 31, 1989, briefs were submitted and arguments were heard on the appropriate remedy and final judgment. Again, the trial court issued a detailed and comprehensive order. The trial court held that whether refunds should be granted is governed by the application of the criteria announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The trial court then concluded that, based on *Chevron*, its holding should be applied prospectively and denied the taxpayers' requests for refunds.

In the main, there are two questions presented to this court by way of appeal and cross-appeal: Whether the franchise tax (§ 40-14-41) is unconstitutional, and if so, what is the appropriate remedy? We will address each issue separately.

I.

First we will discuss whether the franchise tax on foreign corporations (§ 40-14-41) is unconstitutional in that it violates the equal protection clause of the United States Constitution.

The equal protection clause of the United States Constitution requires that a discriminatory tax be rationally related to a legitimate state purpose. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Western & Southern Life Ins. Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981). Unless there is such a legitimate state purpose, the State does not have the authority to impose more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations. *West-*

ern, supra. The equal protection clause forbids a state to discriminate in favor of its own residents solely by burdening residents of other states. *Metropolitan, supra.* As set out by the United States Supreme Court,

> "[t]he validity of the view that a state may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence is confirmed by a long line of this court's cases so holding [cites omitted]."

Metropolitan, supra, at 878. Furthermore, "promotion of domestic business within a state, by discriminating against foreign corporations . . . is not a legitimate state purpose." *Metropolitan, supra,* at 880.

Here, the record is clear that the amount of franchise taxes paid by foreign corporations is enormously disproportionate to that paid by the domestic corporations. As set out in the trial court's order above, Alabama collected almost $94,000,000 in franchise taxes from approximately 29,000 foreign corporations in 1982 and 1983; however, Alabama collected less than $10,000,000 in franchise taxes from 82,000 domestic corporations for the same period. Based on the statistics before it, the trial court found, and we agree, that § 40-14-41 clearly discriminates against foreign corporations in favor of domestic corporations. Therefore, the question becomes whether the discriminatory franchise tax is rationally related to a legitimate state purpose.

The trial court found that there was no legitimate state purpose for imposing more onerous taxes on foreign corporations than on domestic corporations. After a review of the record, as well as the briefs before us, we agree.

From a review of the record before us, we find that the taxpayers sought to discover a purpose for the discrimination against them. During discovery, the Depart-

ment of Revenue (department) was given several opportunities to account for the discrimination. However, the department failed to do so. In fact, the department was specifically requested in an interrogatory to state in detail each and every legitimate state purpose that the State of Alabama was advancing or exercising by distinguishing in the franchise tax scheme. The department's only response was that it relied on the franchise tax law as written. Similarly, the commissioner of revenue and the chief of the franchise tax division were both given opportunities to explain the purpose of the franchise tax system; however, neither of them could offer a reason for the discrimination.

On appeal, the department did advance a reason for the discrimination. It contended that the discrimination against foreign corporations rationally relates to the purpose of offsetting possible *difficulties of enforcing* the franchise tax against foreign corporations. In other words, the State contends that the relationship between the differing tax burdens could be a result of enforcement problems.

We do not find such argument to be persuasive. In fact, the chief of the franchise tax division testified in the trial court that foreign corporations were easier to regulate and the remedy against them easier and less costly to enforce.

We also point out that the franchise tax, as originally enacted, was never intended to discriminate against foreign corporations. In fact, it was determined that the *sole purpose* for different methods of computing the franchise tax was to ensure that there was *no* discrimination between foreign and domestic corporations. *Louisville & N. R. Co. v. State*, 201 Ala. 317, 78 So. 93 (1918). The State intended for its policy toward "domestic and foreign corporations [to be as] uniform as far as possible." *State v. Southern Natural Gas Corp.*, 233 Ala. 81, 88, 170 So. 178, 183 (1936); *aff'd*, 301 U.S. 148 (1937).

We have little difficulty in finding that the franchise tax against foreign corporations is clearly a discriminatory tax with no legitimate state purpose. The State has advanced none, nor can we conceive of any legitimate state purpose which would be served by applying the grossly disproportionate tax. Therefore, we affirm the trial court's partial summary judgment order of July 7, 1989, which declared § 40-14-41, Ala. Code 1975, unconstitutional.

II.

We have concluded above that Alabama's franchise tax is indeed unconstitutional and affirm the trial court's July 7, 1989, order. Now, we turn our attention to the appropriate remedy. The trial court concluded that its decision should have prospective relief only, and the taxpayers have appealed.

The first point of inquiry is whether Alabama's statute or case law mandates refunds of the taxes paid prior to the judicial determination that § 40-14-41 is unconstitutional (July 7, 1989). In order to make such a determination, we must decide whether to apply the trial court's order prospectively or retroactively. If we apply the order retroactively, then, theoretically, the taxes collected from the foreign corporations prior to July 7 would have been collected in violation of the constitution. In that instance, it would appear that the state refund statute would require refunds. See Ala. Code 1975, § 40-1-34. However, if we determine that the trial court's order should be applied prospectively only, then, for purposes of the refund statute, it is as if the taxes paid prior to July 7 were, in fact, constitutionally collected and the foreign corporations would not be entitled to a refund. We also note that we have a third option available. This court could apply the trial court's order "quasi prospectively." Quasi prospectivity, like prospectivity, protects reliance on prior rules or decisions. However, unlike prospective application, if we determine that quasi prospective application is appropriate,

it would afford refund relief to the instant parties in this case.

Therefore, we must now address the question of whether to apply the trial court's July 7, 1989, order prospectively (or quasi prospectively) or retroactively.

At the outset, we would note that the determination of retroactive or prospective application of a decision overruling a former decision is a matter of judicial discretion which must be exercised on a case-by-case basis. *Ex parte State*, 487 So. 2d 898 (Ala. 1986). In deciding whether to give retroactive application to a holding which declares an act unconstitutional, this court must consider matters of public policy. *Land v. Bowyer*, 437 So. 2d 524 (Ala. 1983). Clearly, these questions are very difficult and "*it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.*" (Emphasis added.) 437 So. 2d at 526-27 (quoting *Stallworth v. Hicks*, 434 So. 2d 229, 230 (Ala. 1983)). Furthermore, as stated in *Ex parte State*, *supra*, at 903 (quoting *Cooper v. Hawkins*, 234 Ala. 636, 638, 176 So. 329, 331 (1937)), "where parties have acted upon the law as clearly declared by judicial decisions, they will be protected, although such decisions are thereafter overruled."

We are further guided by *Chevron*, *supra*, where the United States Supreme Court set forth three criteria for determining whether to apply a decision prospectively:

> (1) The decision must establish a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed;
>
> (2) Whether retroactivity will advance or retard the operation of the equal protection clause;
>
> (3) Whether retroactive application would impose inequitable results.

(1) Applying the first prong of the *Chevron* test, we find that this decision does establish a "new rule." The foreign franchise tax structure has been in effect in Alabama since 1907. In 1916, the United States Supreme Court upheld Alabama's franchise tax law as constitutional in the face of an equal protection challenge. *Kansas City, Memphis, & Birmingham Railroad Co. v. Stiles*, 242 U.S. 111 (1916). Then, just two years later, the Alabama Supreme Court upheld the constitutionality of the franchise law. *Louisville, supra*. Finally, in 1937, the franchise tax scheme was again upheld against an equal protection challenge in *Southern Natural Gas Corp. v. Alabama*, 301 U.S. 148 (1937). However, after the *Southern Natural Gas* decision, Alabama's franchise tax structure has not been challenged until now. Therefore, it appears to this court that, during the time the taxes at issue here were collected, the State had no reason to believe that the franchise taxes were unconstitutional. As concerns any argument that the State possessed specific information that showed the gross disparity in tax collections as early as 1984, we find that, in this instance, (1) it is the courts which are the proper bodies to determine the construction and interpretation of statutes and to declare the law, and (2) a statute is presumed valid until it is attacked. *See Casmus v. Lee*, 236 Ala. 396, 183 So. 185 (1938); *see National Can Corp. v. State Dept. of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286 (1988). Thus, it appears that the first prong of the *Chevron* test favors prospective application of the rule.

(2) The second prong of the *Chevron* test has no application here. We have upheld the trial court's determination that the statute is unconstitutional. The court has relieved the taxpayers of the burden, and the legislature will be forced to formulate a franchise tax law which complies with the equal protection clause.

(3) Now we look to the third prong of the *Chevron* test, which involves balancing the equities. If this decision is applied retroactively, Alabama faces possible liability for

over $200,000,000 in refunds for taxes it collected in good faith under a presumptively valid statute. Alabama would have to refund large sums of money it has already spent. Prospective application would avoid imposing a severe financial burden on the State and its citizens. In such situations, courts of other jurisdictions have frequently denied retroactive application, even though the ruling allows an unconstitutional statute to remain in effect for a limited period of time. *See American Trucking Association v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988) (out-of-state truckers were not entitled to refund of taxes found violative of the commerce clause); *National Distributing Co. v. Office of the Comptroller*, 523 So. 2d 156 (Fla. 1988) (prospective ruling appropriate where equities weighed against refund of taxes paid under alcoholic beverage statute); *James B. Beam Distilling Co. v. State*, 255 Ga. 522, 382 S.E.2d 95 (Ga. 1989); *Metropolitan Life Ins. Co. v. Commissioner of Dept. of Insurance*, 373 N.W.2d 399 (N.D. 1985) (no refund of taxes paid under statute giving unconstitutional preference to domestic insurance companies).

We specifically note a recent Georgia Supreme Court case which addressed retroactive application versus prospective application. *James B. Beam Distilling Co. v. State*, *supra*. There, a distilling company brought an action to recover a $2.4 million refund in excise taxes that were paid pursuant to a state statute. The court found that the statute was unconstitutional, but applied its decision prospectively only and denied the taxpayer any refunds. The Georgia court did note that there are a number of cases strongly supporting the argument that, because the statute was unconstitutional, it was void ab initio. Nevertheless, the Georgia court held that the void ab initio rule is not an absolute rule and that it has certain exceptions. The court went on to find that, in balancing the equities of the case, it would be unjust to declare the statute void ab initio, and the court thereby concluded that prospective application of the decision was appropriate.

Therefore, in fairness to all who have justifiably relied upon the constitutionality of § 40-14-41 (*Kansas City, supra*; *Louisville, supra*; *Southern Natural Gas, supra*) and in view of *Chevron*, as well as the equities of this case, we affirm the trial court's decision to apply its decision prospectively only.

We are aware of our authority to apply the trial court's decision quasi prospectively, as the taxpayers request. We are also aware that a quasi prospective remedy would afford relief only to the litigants immediately before the court. The justification for such a remedy would be to reward successful litigants and thereby provide an incentive to challenge existing laws in need of reform. See Comment, *Prospective Application of Judicial Decisions*, 33 Ala. L. Rev. 463 1982. However, quasi prospective relief has been criticized by several commentators in that there is the potential for arbitrariness in a court's decision to apply a new rule to the instant parties and to no one else. A decision to reward a few litigants and deny recovery to other similarly situated litigants may itself raise questions of equal protection. Comment, *supra*.

In view of the above, it is the opinion of this court that justice is better served in this instance in applying a solely prospective remedy. We find that the equities here clearly favor such a result.

Therefore, we find that Alabama's refund statute does not require any refunds in taxes that became due prior to July 7, 1989. Consequently, all taxes that became due prior to July 7, 1989, and that have not been paid, or that have been paid under protest, are due and payable.

We discern a lack of consistency between the July 7, 1989, and the August 4, 1989, orders of the trial court concerning the tax assessments against the taxpayer, GMAC Leasing Corporation. We are satisfied, however, that the August 14, 1989, final order on this aspect clarifies the trial court's decision to apply its decision here

prospectively and not otherwise. We determine the significance of this to be that all taxes which were delinquent prior to July 7, 1989, are due and payable by the taxpayer, GMAC Leasing Corporation.

The scholarly briefs and oral arguments of counsel, as well as the learned trial judge's detailed judgment order, aided this court in developing its opinion.

This case is due to be affirmed.

AFFIRMED.

Robertson and Russell, JJ., concur.

I, John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the copy is a full, true and correct copy of the [illegible] set out as same appears of record in said court. Witness my hand this 28th day of November, 1989.

/s/ John H. Wilderson, Jr.
John H. Wilderson, Jr.
Clerk, Court of Civil Appeals of Alabama

APPENDIX C

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

CASE NO. CV-86-1093 and 87-1837,
88-411, 88-424-426-G

REYNOLDS METALS COMPANY, a corporation,
Plaintiff,

vs.

JAMES C. WHITE, SR., et cetera,
Defendants.

GMAC LEASING CORPORATION,
GENERAL MOTORS ACCEPTANCE CORPORATION and
GENERAL MOTORS CORPORATION,
Plaintiffs,

vs.

DEPARTMENT OF REVENUE, STATE OF ALABAMA,
Defendant.

MEMORANDUM OPINION

Reynolds Metals Company, GMAC Leasing Corporation, General Motors Acceptance Corporation and General Motors Corporation (taxpayers) have initiated proceedings in this Court in which they seek to invalidate the Alabama franchise tax on foreign corporations (Ala. Code § 40-14-41 (1975)) on grounds that it impermissibly discriminates against them in violation of the Equal Protection Clause (U.S. Const. amend. XIV, § 1) and unduly burdens interstate commerce in violation of the the [sic] Commerce Clause (U.S. Const. art. 1, § 8, cl. 3). The case is submitted on cross-motions for summary judgment.

The taxpayers are foreign corporations qualified to do business in Alabama and they are subject to the levy and payment of Alabama franchise taxes pursuant to § 40-14-41. Corporations organized under the laws of Alabama (domestic corporations) are also subject to the levy and payment of franchise taxes; however, the taxes levied against domestic corporations are computed in a manner which results in them paying substantially less franchise taxes than foreign corporations.

Domestic corporations are required to pay $10.00 for each $1,000.00 of capital stock, and the value of the capital stock is derived by determining the aggregate par value of a corporation's issued stock. A foreign corporation's franchise tax is determined by applying the tax rate of $3.00 per $1,000.00 (3%) to the amount of capital employed in the State of Alabama. The amount of capital against which the rate is multiplied is the total of the following items of capital employed in this state: the aggregate par value of its issued stock, surplus and undivided profits, long-term debts, debts to certain related corporations and accelerated depreciation. Section 40-14-41 sets forth the procedures for allocating that portion of a foreign corporation's total capital believed to represent the percentage of capital utilized by the corporation in Alabama. The tax rate is applied to the amount derived by the described procedure.

The taxpayers contend that § 40-14-41 is unconstitutional because (1) it is facially discriminatory and discriminatory in its application and therefore violates the Equal Protection Clause, supra; and (2) unduly burdens interstate commerce and therefore violates the Commerce Clause, supra. Because the Court agrees that the franchise tax against foreign corporations violates the Equal Protection Clause, it pretermits any discussion of the Commerce Clause arguments.

The Court finds that § 40-14-41 facially discriminates against foreign corporations in favor of domestic corporations and likewise is discriminatory in its application. The statistics and figures quoted in the taxpayers [sic] briefs, as supported by the discovery documents, clearly show a gross disparity of franchise taxes paid by a foreign corporation when compared to domestic corporations. In 1982 and 1983, Alabama collected almost $94,000,000 in franchise tax from approximately 29,000 foreign corporations; however, Alabama collected less than $10,000,000.00 in franchise tax from the 82,000 domestic corporations filing franchise tax returns for 1982 and 1983. The Court has considered the other facts and figures set out in the taxpayers' briefs, finds them supported by the evidence, and adopts them as a basis for its holding in this case. Significantly, the Department of Revenue (Department) has failed to advance any legitimate state purpose for this discrimination. Therefore, the Court is compelled to find that § 40-14-41 discriminates against foreign corporations qualified to do business in Alabama and is unconstitutional.

REMEDY

In determining the appropriate remedy for each taxpayer, it is necessary to consider the manner in which each initiated proceedings in this Court.

In Case Number CV-86-1093, Reynolds Metals Company (Reynolds) filed a petition for writ of mandamus asking the Court to direct the Department to certify Reynolds' entitlement to a refund and to direct the state comptroller to draw his warrant to refund the tax years 1982 ($641,611.00) and 1983 ($560,499.00) franchise taxes paid by Reynolds. Section 40-1-34.

In Case Number CV-87-1837, GMAC Leasing Corp. (Leasing) filed an administrative appeal from the Department's final assessment of franchise taxes dated October

21, 1987, for the tax years 1983, 1984, 1985 and 1986 in the total amount of $18,513.00.

In Case Number CV-88-411-G, GMAC filed a petition for writ of mandamus for refund of franchise taxes for the tax years 1983, 1985 and 1986 in the total amount of $3,006,498.00, and it filed an amended petition for refund of 1987 tax year franchise taxes in the amount of $1,874,000.00. In Case Number CV-88-425 GMAC filed a declaratory judgment seeking a refund of 1988 tax year franchise taxes paid under protest in the amount of $1,280,000.00.

In Case Number CV-88-424, General Motors Corp. filed a complaint for declaratory judgment for a refund of tax year 1988 franchise taxes paid under protest in the amount of $206,093.00.

It appears to the Court from the face of the pleadings, with attachments, that in those cases in which the taxpayers have sought a refund the requirements of § 40-1-34 have been met; nevertheless, a hearing will be held on July 31, 1989 at 9:30 a.m. to consider whether the taxpayers have complied with § 40-1-34 in seeking refunds, and for the Court to hear any arguments counsel may wish to present on the appropriate remedy.[1]

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[1] On July 3, 1989, the United States Supreme Court ordered reargument in the cases of *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988), cert. granted, 109 S. Ct. 389 (1988) and *American Trucking Assoc. v. Gray*, 746 S.W. 2d 377 (1988), cert. granted, 109 S. Ct. 389 (1988), and requested the parties to brief and argue the following questions: "When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief; and "May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Clause by retroactively raising the taxes of those who benefited from the discrimination?"

In Case Number CV-87-1837 the final assessment shall be set aside.

A partial judgment will enter.

DONE and ORDERED in chambers this 7th day of July, 1989.

/s/ William Gordon
WILLIAM GORDON
CIRCUIT JUDGE

cc: Joseph W. Letzer
Robert W. Bradford, Jr.
Ron Bowden

APPENDIX D

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

CASE NOS. CV-86-1093 and CV-87-1837, 88-411, 88-424-426

REYNOLDS METALS COMPANY, a corporation,
Plaintiff,

vs.

JAMES C. WHITE, et cetera,
Defendant.

GMAC LEASING CORPORATION,
GENERAL MOTORS ACCEPTANCE CORPORATION AND
GENERAL MOTORS CORPORATION,
Plaintiffs,

vs.

DEPARTMENT OF REVENUE, STATE OF ALABAMA,
Defendant

PARTIAL JUDGMENT

In accordance with the memorandum opinion entered this date, it is ORDERED and ADJUDGED that Ala. Code § 40-14-41 (1975) impermissibly discriminates in violation of the Due Process Clause (U.S. Const. amend. XIV, § 1) against foreign corporations qualified to do business in Alabama and subject to the levy and payment of Alabama franchise taxes, and § 40-14-41 is declared unconstitutional in violation of the Due Process Clause, supra.

It is further ORDERED that that assessment dated October 21, 1987, entered against GMAC Leasing by the

Alabama Department of Revenue is set aside (Case No. CV-87-1837-G).

It is further ORDERED that a hearing is set on July 19, 1989 at 4:00 p.m. to determine an appropriate remedy in those cases not addressed by this partial judgment.

DONE and ORDERED in chambers this 7th day of July, 1989.

/s/ William Gordon
WILLIAM GORDON
CIRCUIT JUDGE

cc: Joseph W. Letzer
Robert W. Bradford, Jr.
Ron Bowden

APPENDIX E

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

CASE NOS. CV-86-1093 and 87-1837,
88-411, 88-424-426-G9

REYNOLDS METALS COMPANY,

Plaintiff,

vs.

JAMES C. WHITE, JR., et cetera,

Defendant.

GMAC LEASING CORPORATION,
GENERAL MOTORS ACCEPTANCE CORPORATION and
GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

DEPARTMENT OF REVENUE, STATE OF ALABAMA,

Defendant.

FINAL JUDGMENT

On July 7, 1989, this Court entered its memorandum opinion holding that Ala. Code § 40-14-41 was unconstitutional because it impermissibly discriminates against foreign corporations in violation of the Equal Protection Clause (U.S. Const. Amend. 14, § 1). On July 31, 1981, briefs were submitted and arguments were heard on the appropriate remedy and final judgment to enter in these consolidated cases. After the Court's memorandum opinion was filed but prior to argument on the remedy, Reynolds Metals Company filed a motion for the Court to set aside preliminary assessments of foreign corporation franchise

taxes for calendar years 1984 and 1985 entered against it by the Alabama Department of Revenue (Department). These assessments are not final; therefore, Reynolds lacks standing to pursue its remedies before this Court.

The Department concedes that if the taxpayers paid the taxes under mistake of law they have complied with the provisions of § 40-1-11 and § 40-1-34 to claim refunds;[1] however, the Department contends that (1) the Court should grant only prospective relief under the Sunburst Doctrine (*Great Northern Railway Company v. Sunburst Oil and Refining Company*, 287 U.S. 358 (1932)), and *Chevron Oil Company vs. Huson*, 404 U.S. 97 (1971); and (2) if the Court orders refunds its order should be stayed until the 1990 legislature has the opportunity to enact a franchise tax law.

In 1981 the United States Supreme Court held that the states may not, consistent with the Due Process Clause, supra, impose more onerous taxes or other burdens on foreign corporations that [sic] those imposed on domestic corporations unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose. *Western & Southern Life Insurance Company v. State Board of Equalization of California*, 451 U.S. 648, 101 S. Ct. 2070, 2083 (1981) (holding that California's retaliatory tax on foreign insurers doing business in the state did not violate the Commerce Clause).

In 1983 or 1984 the Department, at the request of the Legislature, made a study of franchise taxes paid by foreign and domestic corporations. The purpose of the study was to attempt to determine what would happen if domestic corporations were taxed at the same rate and on

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[1] Section 40-1-34 requires that a taxpayer satisfy two requirements to obtain a refund: the taxpayer must file a petition for refund within 3 years of paying the tax and the taxpayer must prove his entitlement to a refund by satisfying the Revenue Commissioner that the tax was paid under a mistake of fact or law.

the same tax base as foreign corporations. In 1984 the Department assisted in drafting legislation which would result in foreign and domestic corporations being taxed on the capital-employed basis. An equalization of the tax base would decrease the disparity between amount of the franchise taxes paid by foreign and domestic corporations.

Mr. Earnest Broadhead, Chief of the Franchise Tax Division, drafted legislation which would have equalized the tax base but the legislation was never introduced in the Legislature. Other legislation was introduced and passed which raised the minimum tax on domestic corporations from $25.00 to $50.00 and increased the tax rates paid by them; however, no attempt has been made to equalize the tax base. See the deposition of Earnest Broadhead taken on August 12, 1988, pp. 8-31.

Before addressing the issue of an appropriate remedy, the Court must address another defense which was belatedly raised by the Department. The Department argues that the taxpayers did not pay the franchise taxes under a mistake of law or fact because the taxpayers paid the franchise tax voluntarily and with full knowledge of the State's franchise tax laws. However, the Department did not develop this argument in oral argument before the Court or in its brief on the remedy.[2] The taxpayers contend that payment of taxes under an unconstitutional statute is a payment under a mistake of law. *Rice v. Tuscaloosa County*, 242 Ala. 67, 4 So.2d 497 (Ala. 1941); *Montgomery County v. City of Montgomery*, 195 Ala. 197, 70 So. 642 (Ala. 1916). These cases do not support this proposition.

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[2] The Department's argument is contrary to the position it took in *Casmus v. Lee*, 236 Ala. 396, 183 So. 185 (Ala. 1938), where the taxpayer requested a refund before the Commissioner because a tax was paid by mistake under an unconstitutional statute and the Commission certified to the comptroller the taxpayers entitlement to a refund.

As a general proposition, a taxpayer who voluntarily pays a tax imposed by an unconstitutional law, and does not know that the law is unconstitutional, may not subsequently recover the tax paid. *Coca-Cola Company v. Coble*, 33 N.C. App. 124, 234 S.E.2d 477 (N.C. Ct. App. 1977) (citing 84 C.J.S. Taxation § 637 [cited in *Rice*, supra] and 72 Am. Jur. 2d State and Local Taxation § 1087). The North Carolina Supreme Court granted certiorari and affirmed but held that this proposition only remains true in the absence of express statutory authority; and the Court pointed out that North Carolina statutes (G.S. 105-267) would have provided the remedy sought by the taxpayer. *Coca-Cola Company v. Coble*, 238 N.E.2d 780 (N.C. 1977). At this point, the Court notes that § 40-1-34 does not condition the right to a refund on the tax being paid involuntarily or under duress, and for the Court to read this condition into the statute would impose a condition not intended by the Legislature.

A more recent decision holds that taxes voluntarily paid under a tax statute which is subsequently declared unconstitutional are taxes paid under mistake of law. *Sun Oil Company v. Oklahoma Tax Commission*, 620 P.2d 896 (Okla. 1980). The Court held that the Oklahoma refund statute provided an administrative remedy to recover taxes erroneously paid and there was no requirement that taxes be paid under protest. The Court further notes that the Alabama refund statute and the Oklahoma refund statute are substantially similar. In view of the foregoing, the Court holds that the franchise taxes paid pursuant to § 40-14-41, which this Court has held unconstitutional, were paid under mistake of law.

The Department further argues that the relief ordered by this Court should be prospective only, and in support of its argument relies on *Chevron Oil*, supra, and *Sunburst Oil & Refining Company*, supra. The taxpayers argue that the remedy is mandated by Alabama's refund statute (§ 41-1-34), and because the Department has conceded that the

taxpayers have met the two requirements of the statute the Court must order refunds.

This Court has found three Alabama cases which considered *Chevron Oil and Sunburst Oil & Refining*; *Jackson v. City of Florence*, 294 Ala. 592, 600, 320 So.2d 68 (Ala. 1975); *Wilger v. Department of Pensions and Security*, 343 So.2d 529, 533 (Ala. Civ. App. 1977); and *Bliley v. State*, 42 Ala. App. 261, 263, 160 So.2d 507 (Ala. Ct. App. 1964).

The Court in *Jackson* abolished the rule of municipal immunity from tort by holding that it was a judicially created rule and not the work of the Legislature; therefore, the Court was not required to invalidate any statute. The Court then opted to apply its new holding quasi-prospectively, i.e., it allowed the plaintiff to proceed with his case against the City of Florence but applied the new rule of law prospectively to all other injured parties. This quasi-prospective application of the rule was bottomed on *Sunburst Oil & Refining Company*. In *Wilger*, the Court of Civil Appeals gave prospective application only to a decision by a three judge federal court which held pertinent provisions of Title 13 §§ 350 & 352 (Code of Ala. 1940) unconstitutional. *Chevron Oil* was one of the cases cited in support of prospective application. Judge Cates in *Bliley* merely referred to *Sunburst Oil & Refining Company* as announcing an unorthodox doctrine, apparently in the context of quasi-prospective application of a new rule of law, when he wrote that a decision of the Alabama Supreme Court announced between the time of trial and consideration of the appeal before him applied prospectively only and did not govern the evidentiary issue confronting the Court of Appeals.

However, in *Ex parte State*, 487 So.2d 898, 903 (1986), the Court held that Morrison's withdrawal of food from its inventory to feed its employers [sic] was subject to sales tax. In reaching its decision the Court overruled *Hamm v. Windham*, 254 Ala. 356, 48 So.2d 310 (Ala. 1950)

but further held that its decision should apply prospectively to protect taxpayers who justifiably relied on *Hamm* which held that the withdrawal was not subject to sales tax. Neither *Sunburst Oil & Refining Company* nor *Chevron Oil Company* were cited by the court. Both *Ex parte State and Jackson* are bottomed on the same premise: the protection of those who justifiably rely on prior precedent.

Before the Court addresses in more detail the State's arguments for prospective relief, it is appropriate to address the taxpayers [sic] arguments that the Alabama refund statute mandates a refund of taxes. The Court has been cited to no Alabama case directly on point. Recently, the Courts of other jurisdictions have adopted the argument proffered by the taxpayer. *Hackman v. Director of Revenue*, [Ms. No. 71628 May 25, 1989] (Mo. 1989) (in banc); *First National Bank of Fredericksburg v. Commonwealth*, 553 A.2d 937 (Pa. 1989).

The Court in *Hackman* relied on the decision by the United States Supreme Court in *Davis v. Michigan Department of Treasury*, ___ U.S. ___ , 109 S. Ct. 1500 (1989) and held that Missouri's taxation scheme which exempted certain retirement benefits paid public employees but failed to exempt pensions of federal retirees violated principles of intergovernmental tax immunity by favoring retired state and local governmental employees over retired federal employees. The Court then held that the Missouri refund statutes (§ 136.035.1, RSMo. 1986 and § 143.801.1, RSMo. 1986) provided the remedy. In so holding the Missouri Court apparently relied, to some extent, on *National Can Corp. v. Department of Revenue*, 109 Wash.2d 878, 749 Pa.2d 1286, 1287 (Wash. 1988) (in banc). However, as the dissent in *Hackman* points out, the Washington Supreme Court in *National Can* did not hold that its refund statute required refunds; rather, the Washington Court held that neither the Washington refund statutes (RCW82.04.4286 & RCW82.32.060) nor Washington case law mandated that refunds were the proper remedy. The

Court in *National Can* applied the *Chevron Oil* test and held that the United State [sic] Supreme Court's decision holding Washington's business and occupational tax unconstitutional applied prospectively. The Court said, "The statutory argument ignores the very meaning of prospective application. Washington case law does not support the proposition that tax refunds are always mandated when a statutory scheme is found to be unconstitutional." Id. at 1287.

In *Allis-Chalmers v. City of North Bonneville*, [Ms. No. 55810-B July 13, 1989] (Wash. 1998) [sic] (in banc), the Court affirmed a lower court decision which found the city business and occupational tax unconstitutional. In affirming the lower court decision which required a refund, the Court again applied the factors set forth in *Chevron Oil*.

The Pennsylvania Supreme Court in *First National Bank of Fredericksburg* held that the Pennsylvania refund statute (P.S. § 503(a)(4) (repealed)) provided a legal right to a refund of back share tax which had previously been held to be computed in violation of federal law. The Court said, "Where a litigant's right to some remedy may be derived from statute, it would be a meaningless exercise for a court to determine whether an identical right is vested in the litigant as a result of prior decisional law." Id. at 941. However, the Pennsylvania refund statute expressly provided that when any tax had been paid under an act which was subsequently held unconstitutional by the final judgment of a court of competent jurisdiction a petition for refund could be filed.

The Supreme Court of Oklahoma against [sic] faced the question of whether refunds were required in *First of McAlester Corp. v. Oklahoma Tax Commission*, 709 P.2d 1026 (Okla. 1985). Although it had decided *Sun Oil* only four years earlier, the Court applied the *Chevron Oil* analysis and held that its decision holding an Oklahoma bank statute unconstitutional should be applied prospectively

from the date of the United States Supreme Court's decision in *Memphis Bank & Trust Company v. Garner*, 459 U.S. 392 (1983) which underpinned the decision of the Oklahoma Supreme Court's finding that the state statutes were unconstitutional.

Based on *National Can* and *First of McAlester Corp.*, the Court holds that neither § 40-1-34 nor our case law does not mandates [sic] a refund of taxes and that whether refunds should be granted is governed by application of the criteria announced in *Chevron Oil*.

Initially, the Court notes that although *Chevron Oil* was not a tax case it has been applied in the circumstances *sub judice*. *Hackman*, supra (*Williver, J.*, dissenting); *National Can Corp.*, supra; and *First of McAlester Corp.*, supra. Additionally, the Court notes that a new rule of law in a tax case should be applied prospectively where retroactive application would injure those who have justifiably relied on past precedent. *Ex parte State*, supra.

The *Chevron* court set forth three criteria for determining whether to apply a decision prospectively. First, the decision must establish a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, whether retroactivity will further or retard the operation of the Equal Protection Clause. Third, whether retroactive application would impose inequitable results. Id. at 92 S.Ct. 355.

Article XII, § 232 of our 1901 Constitution provides for franchise taxes on foreign corporations. As limited by § 232, the Legislature has provided for levy of franchise taxes against foreign corporations since 1907. *State v. Plantation Pipe Line Company*, 265 Ala. 69, 84, 89 So.2d 549 (Ala. 1956).

In 1916 the United States Supreme Court held Alabama's franchise tax law (1911 Ala. Acts 216, § 12) consti-

tutional in the face of an equal protection challenge. The Court held that the tax was imposed equally on all corporations. *Kansas City, Memphis and Birmingham Railroad v. Stiles*, 242 U.S. 111 (1916). Two years later the Alabama Supreme Court upheld the Constitutionality of the franchise tax law in question (1915 Ala. Acts 464, § 16) against the taxpayer's challenge that the method prescribed for ascertaining and fixing the amount of the tax operated as an arbitrary discrimination against foreign corporations. *L & N Railroad v. State*, 201 Ala. 317, 78 So. 93 (1918). The Court held that under the existing circumstances the act did not arbitrarily discriminate between foreign and domestic corporations; however, the Court forewarned that changed conditions could lead to a different result when it said "as follows:

> Therefore the act in question is in thorough accord with our constitution [Ala. Const. art. XII, §§ 229 & 332], and [the taxpayer] cannot complain of same, unless the method for the assessment of the tax in question, as prescribed by both by [sic] §§ 229 and 332 of the Constitution as well as the act *will produce results so wanting in uniformity as to amount to an arbitrary discrimination against* [*the supplied*]. (emphasis added by Trial Court).

Louisville & Nashville Railroad Company at 201 Ala. 319.

The Court in *Penn Mutual Life Insurance Company v. State*, 223 Ala. 332, 135 So. 346 (Ala. 1931) was not called upon to rule on the Constitutionality of the existing corporate franchise tax law (1927 Ala. Acts 163, § 54) but the Court noted that § 232 of our Constitution left to the Legislature the method of fixing or ascertaining the amount of capitol [sic] employed in the State so long as the method adopted did not operate as an arbitrary discrimination. Finally, the constitutionality of the Corporate Franchise Tax Act (1927 Ala. Acts 163, § 54) was upheld against, among other things, an equal protection argument

in *Southern Natural Gas Corp. v. Alabama*, 301 U.S. 148, 81 L. Ed. 970, 876 (1937). The Court has not found any other reported decision in which the constitutionality of the corporate franchise tax law was challenged.

The Court holds that this Court's decision was not *clearly* foreshadowed by prior decisions of any other court. No doubt the State was put on notice by the court's language in *L & N Railroad* that changed circumstances could lead to a judicial finding of impermissible discrimination against foreign corporations. Moreover, it is clear that in 1984 the State possessed specific information which showed the gross disparity in tax collections and that notwithstanding the Department's efforts the State failed to remedy this impermissible discrimination. Finally, although the federal and state organic law remains constant, interpretations of our organic law do not necessarily remain static, they evolve, and one may question whether the State in every instance may *justifiably* rely on every precedent set over 60 years ago. However, the answer to this question is that (1) it is the Court's [sic] which are the proper bodies to determine the construction and interpretation of statutes, and to declare the law; and (2) a statute is presumed valid until it is attacked. *Casmus v. Lee*, 236 Ala. at 398, *National Can Corp.*, 749 P.2d at 1290. Moreover, it cannot be said with certainty that each of the *Chevron Oil* criteria must be met before the Court should decide to apply its decision prospectively. Justice O'Connor's concurring opinion in *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1109, 103 S. Ct. 3492, 3513 (O'Connor, J. concurring), suggests otherwise.

The second criterion in *Chevron Oil* requires the Court to determine if the purpose of Equal Protection Clause will be furthered or retarded by retroactive application. See *National Can Company* at 1291 (Court required to make this inquiry with respect to the Commerce Clause).

States have always been allowed to impose taxes and other burdens of foreign corporations for the privilege of doing business within the state's borders; however, the states cannot, consistent with the equal protection clause, impose more erroneous taxes or other burdens on foreign corporations than those imposed on domestic corporations unless the discrimination between them bears a rational relation to a legitimate state purpose. *Wester and Southern Life Insurance Company*, supra.

The Court holds that retroactive application is not necessary to cure the discrimination between foreign and domestic corporations. The Court has relieved the taxpayers of this burden and the Legislature is now forced to formulate a franchise tax law which complies with the Equal Protection Clause. Moreover, applying the decision retroactively would relieve the taxpayers of even their fair share of taxes while they have claimed the same protections and benefits as domestic corporations.[3]

Finally, the Court must consider whether retroactive application would impose inequitable results.

The State has filed affidavits of the Commissioner of Revenue, the State Comptroller and others to show their reliance on the validity of the franchise tax law in levying and collecting franchise taxes, in budgeting the financial resources of the state, and to show the consequences of retroactive application of this Court's decision. Irregardless of the taxpayers' characterization of the affidavits they are uncontroverted and the Court concludes that retroactive application would result in an intolerable reduction of necessary and vital state and county services, and would impair the financial and fiscal stability of the state.

The Court therefore concludes that its holding should be applied prospectively. In reaching this conclusion the

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[3] In oral argument, counsel for the taxpayers insisted that they would not be accountable for any tax.

Court is not unmindful of the taxpayers' argument that the remedy should be applied quasi-prospectively. However, as the taxpayers have accurately pointed out, this Court does not have jurisdiction over taxpayers who may claim refunds but who are not before the Court, and jurisdiction over them is necessary before this Court could apply its decision quasi-prospectively. Although the taxpayers' argument is appealing, this decision is for the appellate courts, if the parties appeal and if this Court's decision is upheld on the merits.

The State has requested that the Court's decision be stayed until the 1990 Legislature can formulate a franchise tax law which complies with the Equal Protection Clause. The affidavit of the Commissioner of Revenue states that substantially all franchise taxes have been collected; therefore, the Court holds that the State will not be irreparably harmed if the Department's request is denied. The Court is confident that the Legislature will promptly address this issue and pass a constitutional franchise tax law.

Based on the foregoing it is ORDERED that this Court's decision is prospective and that the taxpayers' request for refunds are denied. It is further ORDERED that the State's request for a stay of this decision is denied and Reynolds [sic] motion to set aside the preliminary assessments is denied.

DONE and ORDERED in chambers this 14th day of August, 1989.

/s/ William Gordon
WILLIAM GORDON
CIRCUIT JUDGE

cc: Bruce Rawls
Robert W. Bradford, Jr.
Ron Bowden

APPENDIX F

MAILING ADDRESS:
P.O. Box 157
Montgomery, Alabama 36101

TELEPHONE: 261-4609

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 89-386

In Re: James C. White, Jr., etc., and State Department of Revenue v. Reynolds Metals Company, et al.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

_____ vs _____
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell ___ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 aditional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix File

_____ Submitted on Briefs

_____ Petitioner for Writ of Certiorari denied. No Opinion.

XXXX Application for rehearing overruled. No opinion written on rehearing.

Per Curiam - Hornsby, CJ., Maddox, Jones, Almon, Shores, Adams, Houston, Steagall and Kennedy, JJ., concur

_____ Permission to file amicus curiae briefs granted.

_____

1/12/90
bsa

/s/
Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX G

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly owned except the following:

ACCSCO S.A. (Belgium)

ACE Limited (Bermuda)

AeroVironment Inc. (USA)

AMBRAKE Corporation (USA)

Alliance Development Corporation (USA)

American Manufacturing Systems, Inc. (USA)

Applied Intelligent Systems, Inc. (USA)

Aralmex, S.A. de C.V. (Mexico)

Asset Leasing GmbH (West Germany)

Atlantic Satellites, Ltd. (Ireland)

Automotive Polymer Based Composites Joint Venture and Development Partnership (Co-Partnership among GM, Ford and Chrysler to coordinate basic research on plastic component materials)

Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)

Avis, Inc. (USA)

Beijing International Information Processing Company, Limited (China)

British Caledonian Flight Training, Limited (England)

Bujias Mexicanas, S.A. de C.V. (Mexico)

Calsonic Harrison Co., Ltd. (Japan)

CAMI Automotive, Inc. (Canada)

Carus Grundstucks - Vermietungsgesellschalt mbH & Co. Object Kuno 65 KG (Federal Republic of Germany)

Carus Grundstucks - Vermietungsgesellschalt mbH & Co. Object Leo 40 KG (Federal Republic of Germany)

CEI Co., Ltd. (USA)

China Management Systems Corporation (China)

Cilva Holdings Plc (England/Wales)

Cimflex Teknowledge (USA)

Comau Productivity Systems, Inc. (USA)

Compagnie de Faisceaux Tunisian International S.A. (Tunisia)

Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)

Componentes Delfa, C.A. (Venezuela)

Constructora Venezolana de Vehiculos, C.A. (Venezuela)

Convesco Vehicles Sales GmbH (West Germany)

Daewoo Automotive Components, Ltd. (Korea)

Daewoo Motor Co., Ltd. (Korea)

Delkor Battery Company, Ltd. (Korea)

Detroit Diesel Corporation (USA)

DHB-Componentes Automotivos S.A. (Brazil)

Diffracto Limited (Canada)

E.D.S. Federal Services Corporation (USA)

E.D.S.W.—Mexico, S.A. de C.V. (Mexico)

ELEKLUFT Elektronik-und Luftfahrtgerate GmbH (Federal Republic of Germany)

ELTRO GmbH (Federal Republic of Germany)

Empresa Mixta GEMACVEN, S.A. (Venezuela)

European Components Corporation (USA)

Fabrica Columbiana de Automotores S.A. ("Colomotores") (Columbia)

Federal Integrated Systems Corporation (USA)

First City Bancorp (USA)

Gemeinnutzige Opel-Wohnbau-Gesellschaft mbH (West Germany)

General Motors Bankgeselischaft mbH (Austria)

General Motors del Ecuador S.A. (Ecuador)

General Motors Egypt (Arab Republic of Egypt)

General Motors Kenya Limited (Kenya)

Genie Mecanique Zairose, S.A.R.L. (Zaire)

GM Allison Japan Limited (Japan)

GM Fanuc Robotics Corporation (USA)

GMFanuc Robotique S.A.R.L. (France)

Group Lotus, plc (England)

Hitachi Data Systems Corp. (USA)

IBC Vehicles Limited (United Kingdom)

Ilmor Engineering, Ltd. (England)

Industries Mecaniques Maghrebines, S.A. (Tunisia)

Industrija Delova Automobila, Kikinda (Yugoslavia)

Integrated Systems Management S.p.A. (Italy)

Interactive Entertainment, Inc. (Canada)

Interpractice Systems, Inc. (USA)

Isuzu-General Motors Australia Limited (Japan)

Isuzu Motors Limited (Japan)

ITC Inland Teknik Oto Yan Sanayi Limited Sirketi (Turkey)

Japan Communications Satellite Company, Inc. (Japan)

Japan Satellite Communications Network Corporation Japan)

Kabelwerke Reinshagen GmbH (West Germany)

Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Koram Plastics Company, Ltd. (Korea)

Metal Casting Technology, Inc. (USA)

Motor Enterprises, Inc. (USA)

National Advanced Systems Corporation (USA)

New United Motor Manufacturing, Inc. (USA)

New Venture Gear, Inc. (USA)

NHK Inland Corporation (Japan)

Nippon Avionics Co., Ltd. (Japan)

Nippon EDS., Ltd. (Japan)

Omnibus BB Transportes, S.A. (Ecuador)

Opel-Handler Versicherungsdienst GmbH (Federal Republic of Germany)

ORRCO, Inc. (USA)

Pacific Monolithics, Inc. (USA)

Packard CTA Pty, Ltd. (Australia)

Projectron, Inc. (USA)

Promotora de Partes Electronics Automotrices (Mexico)

P.T. Mesin Isuzu Indonesia (Indonesia)

Rediffusion Simulation Tulsa, Inc. (USA)

Reudas de Aluminio, C.A. (USA)

Robotic Vision Systems, Inc. (USA)

Senalizacion y Accesorios del Automovil Yorka, S.A. Spain)

Shinsung Packard Company, Ltd. (Korea)

Sociedad de Comercializacion Internacional Colmotores S.A. (Columbia)

Societe Francaise des Amortisseurs de Carbon S.A. (France)

Sung San Company, Ltd. (Korea)

Suzuki Motor Co., Ltd. (Japan)

Systems Technology Management Corporation (Korea)

Tactical Truck Corporation (USA)

Telecommunicatins Data Services, Incorporated (USA)

Terminales Electricas, S.A. de C.V. (Mexico)

Transallison S.A. (Brazil)

Truck and Bus Engineering U.K., Limited (USA)

UKADGE Systems Limited (United Kingdom)

Unitech (USA)

United Australian Automotive Industries Limited (Australia)

Vanguarda Componentes Automotivas, S.A. (Brazil)

View Engineering (USA)

Volvo GM Heavy Truck Corporation (USA)

Volvo GM Canada Heavy Truck Corporation (Canada)

Westcott Communications, Inc. (USA)

APPENDIX H

Sec. 229. Special laws conferring corporate powers prohibited; general law as to grant or amendment of corporate charters; corporation franchise taxes to be paid; exemption of benevolent, educational or religious corporations and federal building and loan associations from franchise taxes.

The legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject, nevertheless, to repeal at the will of the legislature; and shall pass general laws under which charters may be altered or amended. The legislature shall, by general laws, provide for the payment to the state of Alabama of a franchise tax by corporations organized under the laws of this state which shall be in proportion to the amount of capital stock; but strictly benevolent, educational or religious corporations or federal building and loan associations organized pursuant to an act of congress known as the Home Owners' Loan Act of 1933, as amended, and as the same may hereafter be amended, or building and loan associations organized under or authorized to do business by the laws of Alabama shall not be required to pay such a tax on their withdrawable or repurchasable shares. The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws. Exemption of the shares of building and loan associations from franchise taxes heretofore provided by statute is ratified.

APPENDIX I

Sec. 232. Foreign corporations doing business in state.

No foreign corporation shall do business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Any foreign corporation, whether or not such corporation has qualified to do business in this state by filing with the secretary of state a certified copy of its articles of incorporation or association, may be sued only in those counties where such suit would be allowed if the said foreign corporation were a domestic corporation. The legislature shall, by general law, provide for the payment to the state of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax.

APPENDIX J

§ 40-14-40. Amount of levy on domestic corporations.

Every corporation organized under the laws of this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax based on its capital stock as follows:

For the tax year beginning	Rate on each $1,000.00 of capital stock
January 1, 1984	$10.00
And all tax years thereafter	$10.00

provided, that in no event shall the amount paid by any corporation for annual franchise tax be less than the sum of $50.00. (cites omitted)

APPENDIX K

§ 40-14-41. Levy on foreign corporations.

(a) Amount of levy.—Every corporation organized under the laws of any other state, nation or territory and doing business in this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of $3.00 on each $1,000.00 of the actual amount of its capital employed in this state. Corporations which have qualified to do business in this state shall for the purpose of this title prima facie be held to be doing business in Alabama; provided, that in no event shall the amount paid by any corporation for annual franchise tax be less than the sum of $25.00.

(b) Definition of capital.—The total capital of such foreign corporation shall be deemed to be an amount equal to the sum of the following:

(1) The outstanding capital stock;

(2) Surplus and undivided profits, which shall include any amounts designated for the payment of dividends until such amounts are definitely and irrevocably placed to the credit of stockholders subject to withdrawal on demand;

(3) The amount of bonds, notes, debentures or other evidences of indebtedness maturing and payable more than one year after the first day of the franchise tax year;

(4) The amount of the bonds, notes, debentures or other evidences of indebtedness maturing and payable at the time to (i) any individual stockholder owning directly or indirectly 10 percent or more of the capital stock of such foreign corporation or (ii) another corporation owning more than 50 percent of the capital stock of such corporation, or (iii) another corporation more than 50 percent of the capital stock of which is owned by such foreign corporation, and which other corporation referred to in (ii) or (iii) is not also required to pay a franchise tax to the state of Alabama;

(5) The amount reasonably required to adjust the depreciable property accounts for any rapid, excessive or unreasonable depreciation charges or amortization, so as to restore the depreciable property accounts, for franchise tax purposes, to original cost less depreciation computed on the basis of the useful life of such property to the corporation.

(c) Determination of capital employed in state.—The actual amount of such total capital as herein defined which is employed in this state shall be determined in accordance with generally accepted accounting principles appropriate in the particular case, and such determination shall establish a rebuttable presumption as to the actual amount of capital employed by the corporation in this state; provided, that in the case of organizations whose accounts and records are kept according to rules prescribed by a regulatory agency or instrumentality of the United States or by the Alabama public service commission, or by a state insurance department, the actual amount of capital employed in this state as so determined shall in no event exceed the value of the sum of its tangible property located in this state and its intangible property employed in the conduct of its business in this state.

[(d) and (e) omitted]

APPENDIX L

"I, James R. Mogle, am Chief Tax Officer of GMAC Leasing Corporation. I have personal knowledge of the matters set forth herein. GMAC Leasing Corporation is domiciled and has its principal place of business in a state other than the state of Alabama. In the years 1983, 1984, 1985, and 1986, GMAC Leasing Corporation was assessed Alabama franchise taxes in the amount of $4,696.00; $13,203.00; $2,639.00; and $2,152.00 respectively. The value of its capital stock during those years was $5,000.00.

Had GMAC Leasing Corporation been treated as an Alabama domestic corporation for franchise tax purposes, its franchise tax assessment should have been $50.00 for each of the said years."

/s/ James R. Mogle
James R. Mogle

SWORN AND SUBSCRIBED before me on this 4th day of October, 1988.

/s/ _____
NOTARY PUBLIC

DCO/JED/MEM